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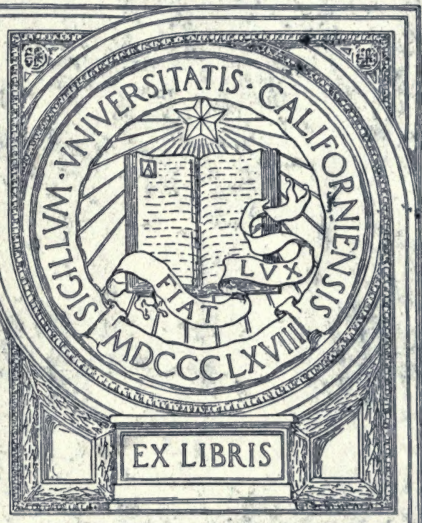

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English Constitutional History.

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English Constitutional History

FROM THE TEUTONIC CONQUEST

TO

THE PRESENT TIME.

BY

THOMAS PITT TASWELL-LANGMEAD,

B.C.L., OXON.,

STANHOPE PRIZEMAN IN THE UNIVERSITY, 1866, VINERIAN SCHOLAR IN THE UNIVERSITY, 1867,
AND LATE PROFESSOR OF CONSTITUTIONAL LAW AND HISTORY, UNIVERSITY COLLEGE, LONDON.

FOURTH EDITION.

REVISED THROUGHOUT, WITH NOTES AND APPENDICES,

BY

C. H. E. CARMICHAEL, M.A., OXON.,

TAYLORIAN SCHOLAR IN THE UNIVERSITY, 1862,
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This Work was Dedicated

TO

THE HON. T. C. AGAR-ROBARTES, M.A.,

CHRIST CHURCH, OXFORD,

NOW SECOND LORD ROBARTES OF LANHYDROCK,

BY HIS FRIEND,

THE AUTHOR.

PREFACE TO THE SECOND EDITION, BY THE AUTHOR.

A SECOND Edition of this work being required, I have taken the opportunity to revise it carefully throughout. While preserving the original arrangement, I have added much fresh matter, and several portions, more especially the Chapter on 'The Succession to the Crown,' and the last Chapter on the 'Progress of the Constitution since the Revolution,' have been to a considerable extent re-written. The latter chapter, from a fear lest the volume should extend to an inconvenient length, had originally been too much compressed. It has now been broken up into two chapters, which will, I trust, be found to treat with adequate fulness the important topics which fall within the post-Revolutionary period.

As stated in the Preface to the First Edition, the aim of the present work is to give a concise but comprehensive history of the origin and development of the English Constitution. Intended primarily as a Text-book for students at the Universities and Inns of Court, it was my hope that the book might also prove not unacceptable to the general reader. For all of us alike, the history of the Political Constitution under which we live must possess a

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practical value, apart from the interest attaching to the many stirring events which light up the story of its genesis and growth. A clear apprehension of the varying political aspect of the English nation throughout its long career, is as essential to a true knowledge of English History as a familiarity with the wars and the social phænomena which mainly arrest the attention of the general historian.

The very favourable reception which this work has met with, and the short space of time within which its position has been established, constitute a source of legitimate gratification, and I have spared no pains to make the present edition as complete as possible.

My obligations to the older writers, Kemble, Lappenberg, Palgrave, and Hallam, as well as to the more recent works of Stubbs, Freeman, and May, are apparent, and have been duly acknowledged. But numerous other writers of eminence have been referred to, and while gladly availing myself of the guidance of previous workers in the same field, I have also personally consulted the Rolls of Parliament, the Mediæval Chroniclers, and other original authorities, and have endeavoured to arrive at an independent judgment on all points of importance.

The arrangement adopted is still, in the main, chronological, but with occasional deviations when some particular topic seemed to require a continuous treatment.

I have adhered to my original plan of considering ecclesiastical matters purely under their political aspect, and of endeavouring, as far as possible, to keep aloof from

all party spirit in describing the nature and growth of our Institutions.

The texts of Magna Charta, the Petition of Right, and the Bill of Rights—those three great landmarks of English Constitutional History—which were given in full in the First Edition, have been supplemented by the text of the Act of Settlement, which completes the written code of our Constitution.

T. P. T.-L.

THE TEMPLE, *December*, 1879.

EDITOR'S PREFACE TO THE THIRD EDITION.

In sending forth the Third Edition of such a book as the present, it seems chiefly necessary to state briefly the reasons which prevailed with me to undertake a task which could only entail much heavy work, and no less heavy a responsibility.

To Oxford men of our generation, and more particularly to those, who, like ourselves, read for Honours in the old undivided School of Jurisprudence and Modern History, it will be unnecessary to say that Taswell-Langmead and I were close friends. I first knew him in the Summer Term of 1862, and I came to know him as a friend of one of my brother competitors in a competition within the University which gained me some of my most valued Oxford friends. Of these some still remain to me, while others, such as Lockhart of University, and Taswell-Langmead himself, have been too early lost to the world, —the former shortly after gaining the crown of his Oxford work by election to the Stowell Fellowship in his College, and on the very threshold of his career at the English Bar; the latter just as his historical work had begun to receive

its due meed of recognition, in his election to the thoroughly congenial Chair which he filled at the time of his death. Knowing Langmead as I had known him, working with him as I had worked with him on the previous editions of this book, I felt that I could bring to the preparation of the Third Edition a more intimate acquaintance with the author's mind on the subject-matter of his book than any other Editor, though better known in the World of Letters. And I still think that I was right in undertaking the task, however the accomplishment may fall short of my desires. I have endeavoured to correct all such press errors as I noticed in revising the present edition, and I have also compared all the extracts of any length and importance with the text of the authors cited, and have, as far as possible, brought them into exact conformity with the originals. In the extracts from *Rot. Parl.* and the Mediæval Statutes, this has often involved the entire re-casting of the text. In the case of writers such as Kemble, I have used the same care to bring the passages cited into conformity with the special orthography of the author, and to shew, in all cases, by the ordinary marks of omission, where an extract was welded together from different portions of the same page, or of following pages, or of text and notes.

The foot-notes which I have added to the present edition are throughout distinguished from Langmead's by the use of square brackets, and generally also by the word "Ed." For the notes at the end of several chapters, where I have brought out and sometimes criticised the views of M. Glasson, in his recent elaborate and interesting

Histoire du Droit et des Institutions Politiques de l'Angleterre, I am necessarily solely responsible, as Langmead had only commenced reading the work, and had not left more than a few pencilled marginal notes by way of a guide to his own judgment of M. Glasson's book.

In illustrating the mediæval portion of Langmead's book, I have frequently cited Mr. Digby's valuable *History of the Law of Real Property*, Mr. Dowell's *History of Taxation*, and Mr. Clifford's *Private Bill Legislation*, on the subjects of their respective works. I have also availed myself of the interesting side-lights thrown upon History by the publications of Societies, such as the Royal Society of Literature, the Royal Archæological Institute, the Camden Society, and others, to a greater extent than in the previous editions. I have departed from Langmead's orthography in the matter of Anglo-Saxon names, because it was a matter on which I knew him to have simply followed others, and not given the result of his own independent judgment, while the point was one on which I always differed from him. At the same time it is one on which I do not think that an iron rule of consistency can be maintained. In the Appendices, for which I am solely responsible, I have sought to say a few words on some topics of Historical interest which seemed to me to require further treatment than could be given in foot-notes, and on some of which Langmead himself would not improbably have spoken had he been bringing out this edition. Where the Appendices refer to passages in the text, I hope they may be found to set them in a somewhat clearer light. I would, of course, by no means have it

supposed that I represent either Langmead's views or any other than my own, in so far as, whether in notes or Appendices, I express any opinion on controverted points. I am indebted to Mr. Luke Owen Pike, M.A., the learned Editor of the Year Books, for the readily given help by which he enabled me to track a reference to the Year Books, left incomplete by Langmead, and to strengthen my own judgment in the case of Dr. Standish and Convocation.

For my old friend Taswell-Langmead's sake, I would express the hope that the present edition of his book may be found not unworthy of his own good fame among students of History alike in the Old World and among our "kin beyond sea."

C. H. E. CARMICHAEL.

NEW UNIVERSITY CLUB, S.W.
February, 1886.

EDITOR'S PREFACE TO THE FOURTH EDITION.

In sending out a Fourth Edition of my old friend's book I think I may be justified in saying that I am glad to find the demand for a new issue making itself felt so soon after the publication of the Third Edition. This is due, I know, to no inconsiderable extent, to its popularity among our "kin beyond sea," of whom I expressed the hope, in 1886, that they would find it not unworthy of the Author's fame. I may, I think, fairly conclude that this has been the case, and I yield with pleasure to pressure from the other side of the Atlantic for an early issue of the present Edition, though it may be at the risk of some points not receiving so full a treatment as I would have liked to give them.

I have drawn attention, in the Appendices which I have added on the present occasion, to some matters of interest, as it seemed to me, from a Constitutional point of view, which had not been so treated in the last Edition. I have, on the whole, decided to let my original Appendices stand, almost untouched, save for some slight alterations in details where any fresh light had reached me in the

interval between the two Editions. This course seems to me alike the most suited to my present convictions and the most likely to procure for me the communication of details which would be of interest both to myself and to the readers of this *History*.

It should be remembered by all who may read the present Edition, that I only put forward any views of my own, whether in Notes or Appendices, by way of suggestion, and in order, as I hope, to be of some use to the student. If I say anything at all, I must, occasionally at least, express some opinion, though I have not always really gone so far in that direction as may have been supposed. Besides the sources named generally in my Preface to the Third Edition, I have, as will be seen by those who may use the present issue, endeavoured to throw light upon my subject from fresh sources akin to those already specified. Among such sources, old and new, I would particularly mention the *Exchequer Rolls of Scotland*, a fitting memorial of the devotion to Historical studies of the late George Burnett, LL.D., Lyon King of Arms, my correspondence with whom lasted down to a very short period of the day when he was taken from among us, while yet full of work and of helpfulness to younger workers. *Alere flammam*, it has well been remarked in the *Law Magazine and Review* for August last, may be said to have been the motto of the late Lyon, as also, I would add, of another distinguished Scottish writer, whose researches have been laid under contribution in my notes, and whose memory I have likewise to cherish for the encouragement which his friendship gave me in more than one line

of study,—the late Alexander, Earl of Crawford and Balcarres.

Some of the points here treated are admittedly obscure, and I can only profess to have stated the latest conclusions or the latest hypothesis which I have been able to form. This is specially the case with the questions concerning Stephen of Aumale, the aid *pur fille marier* taken by Edward I., and the *post-natus* miscalled 'Calvin' in the English Reports.

On some difficult points of genealogy falling within the scope of this History, I have, I hope, been able either to throw new light in the present Edition, or at least to strengthen the position previously taken up by Langmead or myself. I have also added brief genealogical notices of Historical characters, where such information seemed likely to be of use.

I trust that some of the illustrations of Mediæval Life and Law which I have brought together in this Edition from Scottish and Irish sources will be both new and interesting to some of my readers, while our "kin beyond sea" have contributed new matter for the student of Constitutional History in the publication of the *First Constitution of Connecticut*, to which I have devoted one of my Appendices.

I have been indebted to the Worshipful Chancellor Brunel, D.C.L., for a kind communication on a subject connected with Convocation, and to my friends, Sir Sherston Baker, Bart., Recorder of Barnstaple and Bideford, for references with which he kindly supplied

me, and Henry Rutherfurd, Esq., of Fairnington and of the Middle Temple, for the loan of an interesting pamphlet, *The Moors Baffled*, describing Tangier while under the government of Andrew, Earl of Teviot, Lord Rutherfurd.

C. H. E. CARMICHAEL.

NEW UNIVERSITY CLUB, S.W.
September, 1890.

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CHAPTER I.

FROM THE TEUTONIC CONQUEST OF BRITAIN TO THE NORMAN CONQUEST OF ENGLAND.

Origin of the English.

THE first step in a history of the Institutions of the English people is to determine the elements of the English nationality. It is not unusual to speak of the English as a mixed race formed out of the fusion of the Britons, the Anglo-Saxons, the Danes, and the Normans; but this form of expression is apt to convey an erroneous idea of the facts. No modern European nation is, indeed, of pure unmingled race; yet in all some one element has maintained a clear and decided predominance. In the English people this predominant element is the German or Teutonic. The Teutonic conquest of Britain was something more than a mere conquest of the country: it was in all senses a national occupation, a sustained immigration of a new race, whose numbers, during a hundred and fifty years, were continually being augmented by fresh arrivals from the Fatherland.

Teutonic conquest of Britain, A.D. 450–600.

Before the end of the 6th century, the Teutonic invaders had established a dominion in Britain, extending from the German Ocean to the Severn and from the English Channel to the Firth of Forth. The Britons were soon driven into the western parts of the island, where they maintained

themselves for a time in several small states.[1] The remnant of the country which they retained was indeed at first of considerable extent, including not only modern Wales but the great kingdom of Strathclyde, stretching from Dumbarton to Chester, together with Cornwall, Devon, and part of Somerset. But the eastern boundary of this territory yielded more and more to the influence of the invaders; and it was only in the mountains of Wales and Cumbria that the Britons preserved for any length of time their ever-decreasing independence. During the long-continued and peculiarly ferocious series of contests between the natives and invaders, vast numbers of the flower of the British race perished. Many Britons sought refuge in emigration to the Continent. Not a few of the less warlike doubtless remained as slaves to the conquerors, and a still greater infusion of the Celtic element may have been effected by the intermarriages of the victors with the women of the vanquished.[2] But the Germanic element has always constituted the main stream of our race, absorbing in its course and assimilating each of the other elements. It is 'the paternal element in our system natural and political.'[3] Since the first immigration, each infusion of

No general commixture of Races;

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[1] [It is difficult to see the applicability of the epithet "soon" to a process which, according to the received dates given in the text, lasted for a hundred and fifty years. The general result of the Teutonic immigration is indisputable. It ended in Teutonic supremacy, and crushed back those of the Britons who maintained their independence into the western half of the Roman Province of Britain. But there seems to be no use in attempting to maintain in the face of acknowledged facts, that the Britons were "soon driven back." The contrary would appear to be far nearer the truth.—ED.]

[2] This hypothesis is strengthened by the fact that the few words in our language which have been retained from the original Celtic (about thirty-two in number, excluding proper names) have all relation to inferior employments, and for the most part apply exclusively to articles of feminine use or to the domestic occupations of women. See a list by the late Rev. R. Garnett, in his Linguistic Essays. [But Pearson, *Hist. Eng. Early and Middle Ages*, 1867, I. 102, cites another list by Brandes, including lance, spear, &c.

For arguments in favour of a considerable Celtic influence, see, as to language, Vaughan, *Revolutions of Eng. Hist.*, and Kennedy, *Ethnological and Linguistic Essays*, 1861, and as to law, *Law Magazine and Review*, No. cclviii., for Nov. 1885, Art. by J. Williams, B.C.L., *The Welsh Element in English Law*.—ED.]

[3] Stubbs, Select Charters, Introductory Sketch, p. 3. See also Archdeacon Squire, Anglo-Saxon Government in Germany and England (1745); Freeman, Norm. Conq. vol. i.; and Stubbs, Const. Hist. vol. i. The arguments

new blood has but served to add intensity to the national Teutonic element. The Danes were very closely allied in race, language, and institutions to the people whom they invaded; and the Normans, though speaking a different language, and possessing different political and social institutions, were yet descended from a branch of the same ethnic stock.

or of Institutions.

But whatever be the proportion in which the various national elements have coalesced, it is certain that the principles of our Constitution are in no wise derived from either Celt or Roman. The civilisation of the Romans, for the most part, departed with them.[1] The Roman Law disappeared for a time from the judicial system of our country. After the conversion of the English to Christianity, however, it must indirectly have exercised considerable influence on Anglo-Saxon jurisprudence, through the medium of the dignified ecclesiastics who in Witenagemot and Shiremot took so large a part in the making of laws and the administration of justice.[2] Directly, also, it was re-introduced from the Continent, in the 12th century, as a consequence of the revived study of Jurisprudence which had there taken place. In the year 1149,

Roman Law.

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in favour of the opposite theory, of the permanence of the British race, are very ably stated by Mr. L. O. Pike in his Origin of the English. [The late] Mr. Coote, in his Romans of Britain (1878), also maintains the permanence of the population of Britain, but then he affirms that the greater part of the island was occupied by a Belgic race, who began to settle here before the invasion of Julius Cæsar, and that these Belgians were Teutonic. [The late Dr. Guest, in the interesting posthumous collection of his various writings, *Origines Celticæ*, 1885, treats the Belgæ as a Gaelic race, and akin to the Fir-Bolg of Ireland. Dr. Hyde Clarke argues for both an Iberian and a Belgic period of civilisation in Britain, in his Essay on *The Iberian and Belgian Influence and Epochs in Britain*, 1883. For him the Belgæ are examples of 'one class of Iberians,' the Iberians themselves being 'nowhere uniform.'—Ed.]

[1] Mr. Coote (Romans of Britain) has ably urged all that can be said for a more complete survival of the Roman civilisation, 'sheltered in the ark of the cities.'

[2] L'Eglise défendit pied à pied le terrain de la société romaine; elle en fut, sous le gouvernement politique des barbares, la représentation éclairée et courageuse; elle en recueillit, elle en protégea la gloire passée. C'est à elle principalement qu'est due la conservation de ce droit admirable, qui partage encore aujourd'hui avec le Christianisme la domination morale chez les peuples civilisés. Thierry, Tableau de l'Empire Romain, p. 359.

Vacarius, a distinguished Lombard Jurist, who had been invited to England by Archbishop Theobald, established a school of Civil Law at Oxford, and publicly taught the Roman jurisprudence to a numerous and eager band of students, for whose use he wrote his *Summa*, consisting of annotated extracts from the Digest and the Code.[1] Although Vacarius was soon silenced by King Stephen, the impulse which he had given to the study of Roman law was not arrested.[2] The so-called *Leges Henrici Primi* (written probably in the early part of Henry II.'s reign) contain many extracts from the Theodosian Code or the *Breviarium;* and the legal treatises of both Glanvill and Bracton, the latter especially, are strongly marked by a large infusion of Roman principles and terminology.[3] As a system, however, the Roman law was soon rejected in England; but some of its forms, and many of its principles, were absorbed into and amalgamated with the system which our own courts of Justice had been gradually developing for themselves out of the primitive national usages. Our language, and the main outlines of our political and judicial institutions, are all inherited from our Teutonic ancestors; each has undergone a spontaneous development during the course of centuries, each has assimilated new elements; but the national identity of

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[1] Gervas. Dorob. (Decem Script. col. 1665), in describing the strife between Theobald, Archbishop of Canterbury, and the Papal Legate, Henry Bishop of Winchester, says: 'Oriuntur hinc inde discordiae graves, lites et appellationes antea inauditae. Tunc leges et causidici in Angliam primo vocati sunt. Quorum primus erat Magister Vacarius. Hic in Oxonfordia legem docuit.' Robertus de Monte is the authority for the date, 1149, and for his compilation of nine books from the Code and Digest 'qui sufficiunt ad omnes legum lites quae in Schola frequentari solent decidendas.'

[2] Vacario nostro indictum silentium, sed Deo faciente, eo magis virtus legis invaluit quo eam amplius nitebatur impietas infirmare. Joh. Sarisb., Polycraticus, lib. viii. c. 22.

[3] Of Bracton 'the entire form and a third of the contents were directly borrowed from the Corpus Juris.' (Sir H. S. Maine, Anc. Law, p. 82.) Bracton was largely indebted to Azo's *Summa* on the Code and Institutes of Justinian. (Savigny, Geschichte des Römischen Rechts, iv. 583 *seq.*) Sir Travers Twiss, in the Introductions to the several volumes of his new edition of Bracton, has thrown fresh light on the dates and incidents of the great legist's career.

race, language, and institutions has never ceased to exist.[1]

Germanic origin of English institutions.

The germs of our present constitution and laws must, therefore, be sought in the primeval institutions of the first Teutonic immigrants. Of these institutions we have little positive knowledge. According to Bede,[2] the original immigrants consisted of the three kindred tribes of Angles, Saxons, and Jutes. Of these Tacitus does not even mention the Saxons or Jutes, and only names the Angles as one of a number of North German tribes, without fixing their locality. In the second century Ptolemy identifies the seats of the Saxons and Angles as the district between the Elbe, the Eyder, and the Warnow, now constituting the modern Duchies of Holstein, Lauenburg, and Mecklenburg. Before the age of Bede the name of Saxon had been extended from the designation of a single insignificant tribe to that of a wide confederacy of North German tribes. Retaining their independence of Rome, tenacious of their heathen worship and their primitive barbarism, they habitually plundered the richer nations who had succumbed to the Roman sway.

Scarcely, if at all, affected by contact with Roman influences, the Teutonic tribes who invaded Britain had probably a less distinctly marked political organisation than that of their kindred on the banks of the Rhine and the Danube, a picture of whose institutions has been handed down to us in the pages of Cæsar and Tacitus.[3] But after

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[1] 'The very diversity of the elements which are united within the Isle of Britain serves to illustrate the strength and vitality of the one which for thirteen hundred years has maintained its position either unrivalled or in victorious supremacy. If its history is not the perfectly pure development of Germanic principles, it is the nearest existing approach to such a development.'—Stubbs, Const. Hist. i. 6.

[2] Bede (b. 672, d. 735) records very few circumstances relative to the English conquest of Britain from his own sources, but for the most part transcribes the *De Excidio Britanniae*, composed about 560, of Gildas, b. 516.

[Morley, *Eng. Writers before Chaucer*, 1867, i. 348, places Bede's birth "in, or a few months before or after," 673. Robertson, *Hist. Chr. Ch.*, 1874–5, iii. 29, "about the year 673." Morley, *op. cit.*, says Gildas was born "in or soon before the beginning" of the 6th cent.—Ed.]

[3] [With regard to the testimony of Tacitus, there have not been wanting those who have seen in his *Germania* little more than an elaborate satire on the

making due allowance for this difference, for the indistinctness of the picture itself, and for the contradictory ways in which it has been interpreted, we may yet gather from this source some general knowledge of the primeval institutions of our Teutonic forefathers.

Ancient German polity.

In the time of Tacitus, Germany appears to have been divided among a number of independent tribes, who had ceased to be nomadic and occupied fixed seats in settled communities.

The whole land of the settlement belonged to the community (the *Mark*,[1] or *Vicus*), who annually allotted the

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Roman morals of his day. And a still deeper incredulity has very recently been manifested in France, where, according to the *Belgian News*, Brussels, 22nd Feb., 1890, 'M. Hochart has published a work on the authenticity of the Annals and Histories of Tacitus, in which he endeavours to prove that they are the work, not of Tacitus, but probably of an Italian scholar of the 15th century, Poggio Bracciolini.' It is scarcely probable, however, that the general verdict of historians and men of letters will be reversed at this late date.—ED.]

The Mark system.

[1] La constitution de la Marche paraît dans Tacite. Il la désigne évidemment dans son xxvie chapitre par le mot *ager*, qu'il oppose à *arva* [*arva per annos mutant, et superest ager*], et quand il dit que les barbares aimaient à entourer leurs habitations et leurs champs de vastes terrains vides [*suam quisque domum spatio circumdat*, c. 16] pouvant leur servir de défense. Or l'usage de la Marche est le signe d'une transition entre l'état nomade et l'état agricole, entre le régime de l'entière communauté de la terre et celui où commence à se montrer la propriété foncière privée. En effet la Marche est un vaste territoire indivis qui s'étend au delà des cultures—un vrai boulevard. Geffroy, *op. cit.*, p. 185. [On p. 179, *n.* 1, Geffroy notes the extreme difficulty of the celebrated passage in the *Germania*, c. xxvi., both as to readings and sense.—ED.] On the Mark system in its social, judicial, and political aspects, see Kemble, Saxons in England; G. L. Von Maurer, Gesch. der Marken Verfassung, &c.; Schmid, Gesetze der Angel-Sachsen; Nasse, Agricultural Community of the Middle Ages (by Ouvry); Stubbs, Const. Hist. vol. i.; Maine, Village Communities, Lects. i. and iii. [Cf. also, Garsonnet, *Hist. des Locations Perpétuelles*, 1879, Germ. Mark, p. 40 *seq.*; do. Merovingian and Carolingian, p. 496 *seq.*; Seebohm, *Village Community in England*, 1883; Hearn, *The Aryan Household*, 1879; G. L. Gomme, in *Report of Glasgow Archæol. Soc.*, 1885; Green, *Making of England*, 1881; *Traces of Teutonic Settlements in Sussex*, by F. E. Sawyer, in *Archæol. Journal*, vol. xli.; and Digby, *History of the Law of Real Property*, 3rd ed., 1884. Cf. also, G. L. Gomme, Art., *Chippenham as a Village Community*, *Arch. Rev.*, vol. i. pp. 102, 203; Prof. Kovalevsky, *Villenage in England*, *Arch. Rev.*, vol. i. p. 444; *Origin and Growth of Village Communities in Russia*, *Ib.* i. p. 266; G. L. Gomme, Art., *Village Community at Aston* (1657), *Arch. Rev.*, vol. ii. p. 29; W. J. Ashley, *Introd. to Economic History and Theory in the Middle Ages*, Lond. 1888. For a recent account of the Servian village system, cf. *Revue Bleue*, Paris, 1890, vol. 45, No. 7, pp. 198–204, Art., *L'Etat Social de la Serbie*, by Paul Seippel, who says, *Ibid.*, 200, 'Le village, c'est la famille agrandie. Il a sa *slava*, sa fête patronale. . . . Les Serbes voient dans cette fête un des signes caractéristiques de leur race.' A remarkable instance of

arable land among the freemen, while the pasture land was both held and used in common.

An aggregate of communities (*vici*) of the same tribe constituted the *pagus* (the *Gau*); and an aggregate of *pagi* made up the *civitas*, or *populus*.[1]

In their political life the monarchic, aristocratic, and democratic elements were clearly marked; but the ultimate sovereignty seems to have resided in a free and armed people.[2] Some of the tribes had kings selected from particular families; others had not. But the King had only a limited power,[3] and was rather the representative of the unity of the tribe than its ruler.

In the *Vici* and *pagi* justice was administered by *principes*, elected by the nation in its popular assembly, and assisted in each district by a hundred companions or assessors.[4]

They had also *Duces*, their leaders in war, elected probably from among the *principes*, but whose authority was based, not like that of the kings, on noble birth, but on

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the persistency of archaic customs is furnished by M. Seippel in the circumstance that this *Slava* is kept up even by Bosnian families converted to Mohammedanism, a fact which bears out the account of the Bosnian Begs given in the *Law Magazine and Review*, No. ccxxiii., Feb. 1877, p. 232, Art., *The Land System of Bosnia*. A volume on *The Village Community*, from the pen of Mr. G. L. Gomme, is announced as forthcoming in the Contemporary Scientific Series, in *Folk-Lore*, vol. i. No. i., for March, 1890, from which it would appear that Mr. Gomme proposes to use some of the results of Folk-Lore to prove that the English village community is not simply an economical institution, but one which contained much of the old tribal religion. How far this may be capable of proof is perhaps a question.—ED.]

[1] [The difficulty of understanding, and consequently of accurately rendering these names given by Cæsar and Tacitus to Teutonic institutions, is noted by Geffroy, *Rome et les Barbares*, Paris, 1874, p. 207, where he justly remarks that those writers were evidently interpreting a foreign terminology which they may not themselves have thoroughly understood. *Pagus* is connected by Geffroy, p. 209 (*n.* 1), following Rudorff, *Gromatici Veteres*, ii. 239–40, with *pax*, *pango*, πάγω, πήγνυμι, and *vicus* with οἶκος.—ED.]

[2] De minoribus rebus principes consultant, de majoribus omnes; ita tamen ut ea quoque quorum penes plebem arbitrium est, apud principes pertractentur.—Tac. Germ. c. xi.

The well-known words of Montesquieu, speaking of the English Constitution, 'Ce beau système a été trouvé dans les bois,' have reference to the existence of this triple constitution among the Germans.

[3] Nec regibus infinita aut libera potestas.—Tac. Germ. c. vii.

[4] Eliguntur in iisdem consiliis et principes qui jura per pagos vicosque reddunt. Centeni singulis ex plebe comites consilium simul et auctoritas adsunt. *Id.* c. xii.

personal valour.[1] Each district contributed its hundred fighting men to the national host.

The *principes* were attended by bands of retainers (*comites*), who protected the person of their lord in war and upheld his state in peace,[2] receiving in return such presents as their leader could confer.

The power of all the chiefs, whether *reges*, *duces*, or *principes*, was greatly limited. All important State affairs were discussed and determined in the national assemblies, held at stated times, and attended by all the freemen of the tribe. Questions of minor importance were settled by the *principes*, meeting as a separate body, and this body also appears to have taken the initiative in bringing matters before the large assembly.

Below the freemen was a class of men intermediate between the slave and the freeman. They were not slaves, but they had no political rights. They were the cultivators of the soil which they held under the freemen, to whom they rendered a part of its produce as rent. Last of all came the mere slaves, chiefly made up of prisoners of war and of freemen who had been degraded for some crime.

Among the freemen there were differences of rank and social status; some were of noble blood and some were not; but this distinction carried with it no inequality of political rights. Military valour was shared by the Germans with all the northern nations; but one of their national traits was remarkable from the earliest times—the respect paid by them to the women of their race, who on their side were celebrated for an exceptional chastity. The tie of kindred was strong and all-pervading; it formed the basis of social organisation, and entered into the military, the legal, and the territorial arrangements.[3] Side by

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[1] Reges ex nobilitate, duces ex virtute sumunt. Tac. Germ. c. vii.

[2] In pace decus, in bello praesidium. *Id.* c. xiii. [For the Celtic *comites*, see Lefort, *Le Droit et les Institutions des Gaulois*. Paris: Thorin, 1877. —ED.]

[3] See Tacitus, *op. cit.*, for the importance of the family tie; its bearings on

side with it may be discerned the germ of Feudalism in the relation existing between the *princeps* and his *comites*, though it was as yet unconnected with the tenure of land.

Such were the general features of the Political and Social system which our Teutonic forefathers brought with them to their new island home. But the process of migration and conquest necessarily produced certain modifications and developments of the primitive institutions. One of the earliest of these developments was the institution of Royalty.

The Teutonic leaders assume the Regal title.

According to the Saxon Chronicle, the chieftains of the first settlers were only distinguished by the title of *Ealdorman*, or *Heretoga*, the former word expressing the civil, the latter the military, aspect of the same office.[1] But the successful leader soon won for himself a position much stronger than that of any chief in the old land, and, in most cases, assumed the regal title, as more accurately denoting his altered relation to his followers.[2] The word Cyning, or King, [probably] connected [in Teutonic thought] with Cyn, or Kin, marked out the bearer of the title as the representative of the race, the head and leader of the people, not the lord of the soil. His reputed descent from Woden, the God from whom all the English kings professed to

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the host, c. 7; feuds, c. 21; inheritance, c. 20; the kin of the unfaithful wife, c. 19; exogamy unusual, c. 4. Geffroy (*op. cit.*, p. 207), says: Il est facile de distinguer dans les récits de César et de Tacite l'existence de petits groupes d'autant mieux constitués que les cercles en sont plus étroits, et qu'on se rapproche d'avantage du groupe le plus simple et le moins nombreux, celui de la famille.

[1] *S. a.* 449 (of the Jutes): Heora *heretogan* . . . . Hengest and Horsa. *S. a.* 495 (of the West Saxons): Her comen twegen *ealdormen* on Brytene, Cerdic and Cynric.—A.-S. Chron.; cf. Freeman, Norm. Conq. i. 77.

[2] [The text here, and immediately above, lays down the early development of Royalty in Teutonic Britain; and the earliness of the kingly title, and its identity with that of 'chief,' or 'great man,' is similarly involved in the language of Mr. Digby, *Hist. of the Law of Real Property* (3rd ed., 1884). But it appears difficult to consider a 'development' early, or an assumption 'soon' made, which does not shew itself for nearly a century after the Teutonic conquest had commenced. With regard to the position of the *Heretoga* among the Germanic nations, he was, says Reichel, *See of Rome in the Middle Ages*, 1870, p. 561, 'a leader in war, belonging to a privileged family, who, in consequence, was said to be descended from the god of war; but he was after all one of the warriors.' The sanctity which came to be attached to the person of the King was, Reichel shews, due to the influence of the Church.—ED.]

descend, invested with a semi-sacred character the authority which his own prowess and the will of the people had conferred upon him.

Conversion of the English to Christianity (597—681).

The conversion of the English to Christianity exercised an important influence upon the national development. The Church not only introduced a higher civilisation, mitigated the original fierceness of the heathen conquerors, softened their pride of birth and race, and exalted the power of the intellect above that of brute force, but also supplied a new and powerful bond of union to a divided people. Once within the pale of the universal Christian Church, the English, moreover, were necessarily brought into relations with the general political society of Europe; and in the highly organised system of ecclesiastical synods they found a pattern by which to regulate the procedure of their own political assemblies.

National character of the Church.

From the first the Church entered into the closest alliance with the State, and while paying respectful deference to the Roman See, grew up with a distinctly marked National character. Theodore of Tarsus, enthroned Archbishop of Canterbury in 668, reduced the whole Ecclesiastical organisation of the various kingdoms into one National Church.[1] Henceforward the Church existed as a united, central, and national institution, in spite of the separation and frequent hostility of the states to which the clergy individually belonged. Thus the Ecclesiastical unity preceded and pointed the way to the Civil unity of the nation. After the first missionary prelates had passed away, the highest spiritual dignities were filled by Englishmen, members, for the most part, of noble and powerful families. The tie thus created between the clergy and the State was strengthened by the union of secular and spiritual functions. The Bishops were prominent members of the Witenagemot, and frequently acted as the chief ministers of the King. They also shared with

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[1] Isque primus erat in archiepiscopis cui omnis Anglorum aecclesia manus dare consentiret.—Bede, Hist. Ecc. iv. 2; Kemble, Saxons in England, ii. 364. [Ed. 1849.]

the Ealdormen in the local judicial administration. The Church thus entered into close combination with the Civil organisation, gradually intertwining itself with all the feelings and customs of the people, and acquiring in the process its exceptionally national character.

The *Bretwaldas.*

During the whole period commonly called the Heptarchy,[1] the land was full of petty kings or princes, some one of whom, from time to time, obtained a forcible predominance over his neighbours. Bede enumerates seven who are said to have enjoyed such a predominance or leadership over nearly the whole island; and the Saxon Chronicle speaks of Egbert as 'the eighth king who was Bretwalda.'[2] What were the exact nature and extent of the dominion of these Bretwaldas is very doubtful; but we may accept as a fact that each of the seven had acquired and exercised some kind of supremacy over all his neighbours. The existence of the Bretwaldas would seem to indicate certain earlier attempts at a union of the whole English race, which was ultimately carried out by the West Saxon kings in the 9th and 10th centuries.[3]

The three kingdoms of Wessex, Mercia, and Northumbria at length became predominant. Egbert, King of the West Saxons, not only added to his dominions the dependent kingdoms of Kent and Essex, but compelled the extensive states of Mercia and Northumbria to acknowledge his supremacy. Still the Mercians, East Anglians, and Northumbrians retained each their ancient line of

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[1] There were at least nine, if not ten, independent states founded by the invaders; and there was never a confederate government composed of the different states as members. The word Heptarchy, therefore, is not accurate, but it is convenient if taken to denote the greater prominence of seven states out of the number.

[2] Bede, Hist. Eccles. ii. 5; Chron. Ang.-Sax. ann. 827. Mr. Kemble points out that of six manuscripts in which the passage quoted occurs, only one reads '*Bret*walda,' four have *Bryten-walda*, and one *Breten-anweald*. 'The true meaning of this word, which is compounded of *wealda*, a ruler, and the adjective *bryten*, is totally unconnected with Bret or Bretwealh, the name of the British aborigines. . . *Bryten* is derived from *breðtan*, to distribute, . . disperse: it is a common prefix to words denoting wide or general dispersion, and when coupled with *wealda* means no more than an extensive, powerful king—a king whose power is widely extended.'—Saxons in England, ii. 20.

[3] Freeman, Norm. Conq. i. 28.

kings, and neither Egbert nor his five immediate successors assumed any other title than that of King of the West Saxons. This is the only style used by Alfred in his will.

Invasions of the Danes. 787—1070.

The consolidation of the various kingdoms into one was hastened by the invasions of the Danes, by which the three minor kingdoms of Mercia, Northumbria, and East Anglia were overwhelmed, and even that of the West Saxons was brought to the brink of destruction. Led by their famous Sea-kings, these 'Slayers of the North' ravaged almost every European coast during the 9th and 10th centuries. They were closely akin to the English, and spoke another dialect of the same common Teutonic speech. Their institutions exhibited a striking similarity to those of the English, and even where differing in detail were generally governed by identical principles. The first recorded descent of the Danes upon the shores of England occurred towards the end of the 8th century. They re-appeared again and again, and at length, instead of making mere predatory excursions, began to form permanent settlements in the island. The genius and heroism of Alfred [1] alone rescued the English from their imminent peril. Yet he was never able to expel the Danes from England, or to become its sole master. By the treaty of Alfred and Guthrum (A.D. 879), the limits of the Danish occupation southward were defined 'up on the Thames, and then up on the Lea, along the Lea unto its source, then right to Bedford, then up on the Ouse unto Watling Street.' [2] To the North it extended as far as the Tyne, and on the West to the mountain districts of Yorkshire, Westmoreland, and Cumberland. Throughout this district—the *Denalagu*, or region where the Danish law was in force—the *armies*, as the Saxon

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[1] [Mr. Goldwin Smith, in his Lectures as Regius Professor of Modern History in the University of Oxford, delivered in Easter Term, 1863, spoke of Alfred as standing out, with St. Louis, as one of the perfect, ideal kings, and described his genius as Anglo-Saxon, strictly practical, considering him as the great man of the Anglo-Saxon race. From MS. notes of the Lectures.—ED.]

[2] Thorpe, Anc. Laws and Inst. ann. 879.

Chronicle expressly terms them, of the Danes continued to occupy the land, governing, as a military aristocracy, the subject Anglian population. The victorious arms of Alfred's three able and energetic successors, Edward, Athelstan, and Edmund, succeeded in reducing the Danes to something like real submission, and also in obtaining an acknowledgment of supremacy over the bordering nations of the isle of Britain. At length, in 959, Edgar, having outlived the last Danish king of Northumbria, received the crown as King of all England, uniting in his person, as the elect of all three provinces of England, the threefold sovereignty of the West Saxons, Mercians, and Northumbrians.[1] The English and the Anglo-Danes gradually coalesced, the English language and institutions maintaining the ascendancy, though appreciably influenced by contact with the foreign element in their midst.

After the death of Edgar the Peaceable (viz., in 975), the minority and feeble character of Ethelred the Unready provoked fresh attacks from Denmark. These now assumed the form of a regular war of conquest, conducted by the kings of a country which had at length been admitted within the civilising pale of Christendom, and whose people were no longer ferocious pirates, like their ancestors in the former invasions. The English Royal house was for a time supplanted by its Danish rival, but the polity of the Kingdom was not changed. The English still outnumbered their conquerors; and on the death of Harthaknut, in 1042, the ancient line of Cerdic regained the throne. With the exception of the reigns of Harold II. and the first four Norman kings, descendants of the House of Cerdic have occupied it ever since.

Before the Norman Conquest, the various Teutonic tribes had coalesced with one another and with the descendants of the Danish settlers, and had become fused into one nation. We have now to enquire what was the Constitution of the English nation from the 7th to the 11th

[1] E. W. Robertson, Hist. Essays, p. 203; Stubbs, Const. Hist. i. 173.

Constitution of English nation from 7th to 11th century.

century; a Constitution which survived the Norman Conquest, and which in all its essential principles—developed and adapted from time to time to meet the requirements of successive generations, but still the same—has continued down to our own day.

Appropriation of the soil.

Of the exact process by which the territory conquered by each of the invading tribes was divided amongst the colonists, we have no positive knowledge. Any statement on this point must therefore necessarily be hypothetical. But there can be little doubt that, as to a large portion of the land of each colony, a principle of allotment was generally adopted based upon the existing divisions of the host into companies, each consisting of a hundred warriors united by the tie of kinship. The allotment of land made to each hundred warriors would be sub-divided, according to the minor divisions of the kindred into *mægths*, *i.e.*, a greater or less number of settlers closely connected by the family tie.[1] Certain portions of the land appropriated to the separate *mægths* were held in absolute ownership by the heads of families; other portions were both held and cultivated in common as the common property of the community.

General allotment probable.

The *mægth*.

Private estates of the chiefs.

Besides the land thus divided among the simple freemen, a further portion of the territory was retained by the chief of the tribe as his private estate; and it is probable that the nobles also and leaders of subordinate rank either themselves appropriated, or received, grants of estates in severalty.

Public lands.

All the land which remained after satisfying these various claimants was the common property of the whole colony—the Folkland. As the various tribal colonies or shires coalesced into kingdoms, and the Kingdom of Wessex absorbed the other kingdoms, and developed into

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[1] 'There were two groups of individuals in the Anglo-Saxon community to which the word family may be applied. . . The first and larger group, including the whole body of the kindred, is called in Anglo-Saxon the *Mægth* or *Mægburh*. . . The second and smaller group, including only the husband, his wife, and children, may be called the household.' Young, Essays in Anglo-Saxon Law. Boston. 1876. On the *Mægburh*, see further, Kemble, Saxons in England, i. 234.

the kingdom of England, the Folkland of the shire became in turn the Folkland of the provincial kingdom and of the English nation.

Absolute ownership in severalty soon became the general rule.

Although tenure of land in common by local communities continued to subsist, and has left its traces in the common lands of townships and manors of the present day, absolute ownership in severalty, which had existed from the first, soon became the general rule.

During the pre-Norman period, therefore, the whole land of England may be broadly divided under the two great heads of (1) Public, or *Folcland;* and (2) Private, or *Bocland.*

Folcland.

(1) *Folcland,* the land of the folk or people, was the common property of the nation. It formed the main source of the State revenues, and could not be alienated without the consent of the national council. But it might be held by individuals, subject to such rents and services as the State, in its landowning capacity, should think fit to determine. While, however, it continued to be Folkland, its alienation was only temporary, and could not be in perpetuity; so that at the expiration of the term for which it had been granted it reverted to the nation. It was closely analogous to the *ager publicus* of the Romans, and its individual holders to the Roman *possessores.*

Bookland.

(2) *Bocland*[1] was land held in full ownership, either as part of an original allotment, or as having been subse-

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[1] *Bocland*=land conveyed by book or charter, the usual mode after the introduction of writing. Though all land, on being granted in perpetuity, ceased to be *Folcland*, it was not strictly *Bocland*, unless conveyed in writing. Land thus held in absolute property has been called in different Teutonic dialects, *eðel*, *odal*, or *alod.* Similar to the possessors of *Bocland*, both in name and with reference to the nature of their possessions, were the *libellario nomine possidentes* and the *libellarii* of the Lombards and Franks. [So Thorpe's Lappenberg, A.-S. ii. 324 *n.* But the Lombard *libellarius* seems to have been an *emphyteuta*, and to have got his name from the *libellus*, or petition, which he presented to the lord. See Baudi di Vesme, *Vicende della Proprietà in Italia*, 1836, pp. 103, 172. *Contra*, Lefort, *Location Perpétuelle*, 1875, p. 157, but apparently only as applied to church lands. Garsonnet, *Hist. des Locations Perpétuelles*, 1879, p. 262, cites from a Pavia capitulary of 876, *libellario nomine vel enfiteuticario jure*, and quotes Muratori for *libellarius* and *emphyteuta* as synonymous. On Udal Tenure in Orkney, cf. *Law Magazine and Review*, No. cclxix., for Aug., 1888, Art. *Law and Self-Government in Orkney*, by A. W. Johnston, and No. cclxxi., for Feb., 1889, Art. *The Udallers and the Local Government Bill, Scotland.*—ED.]

quently severed from the Folkland, with the consent of the nation, and appropriated to individuals in perpetuity, subject merely to such burdens as the State, in its political as distinguished from its landowning capacity, might impose upon its members.

Folkland, even when granted to individuals for a life or lives or other term in severalty, always retained certain marks of its public character in the burdens to which it was liable. Its possessors were bound to assist in the execution of various public works, including the repair of royal vills; and they might be called upon to entertain the King and great men in their progress through the country, and to furnish carriages and horses for their service. Bookland, on the contrary, was released from all public burdens, except the *trinoda necessitas*, or liability of its owners to military service and to a contribution for the repair of fortresses and bridges (*fyrd*, *burh-bôt*, and *brycge-bôt*).

Bookland might be held for various estates or interests. It was generally alienable *inter vivos*, devisable by will, and transmissible by inheritance. It might be entailed or limited in descent, in which case the owner was deprived of the power of alienation. The King, like any of his subjects, had private estates of Bookland which did not merge in the Crown, and over which he exercised the same powers of disposition as a private individual.[1] In

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[1] [To the same effect, Digby, *Hist. Law of Real Property*, 3rd ed., p. 14, and see notes there.—ED.] From the will of King Alfred (Cod. Diplom. ii. 112) it is evident that both he and his grandfather Egbert had the absolute disposal of their bocland. Allen (Royal Prerogative, p. 144) thus sums up the information on the land laws of the Anglo-Saxons contained in this interesting document: 'It appears that Egbert, grandfather of Alfred, had settled his landed property on his male in preference to his female heirs; that Ethelwulf, father of Alfred, had bequeathed various estates to his younger children, and regulated, in certain contingencies, how they should descend; that Alfred himself and two of his brothers had acquired landed property, in addition to the inheritance they received from their father; that their rights over their estates were settled and adjudged in the courts of law, as if they had been private individuals; and lastly that Alfred was empowered to make a new settlement of his lands by a decision of the witan in these words, "It is now all thine own; bequeath it, give it, or sell it to kinsman or stranger, as it pleaseth thee best."'

the course of time much of the Folkland was converted into Bookland. Large grants were made to the Church, and also to individuals for specific purposes, as for the pay of the King's thegns (thegn-land), of the gerefa (gerefa-land, reve-land), or of the officers of the Royal household.

Both Folkland and Bookland might be leased out to free cultivators, in such quantities and on such terms as the holders pleased. When so leased out, it was termed *lænland* (land lent or leased).

As the Regal office advanced in dignity and power, a tendency set in to substitute the King for the Nation as the owner of the national lands; the word Folkland gradually fell out of use, and was replaced by the term *terra regis*, or Crown-land. This tendency reached its climax after the Norman Conquest, when the whole land of the kingdom came to be regarded as the demesne land of the king, held of him by a feudal tenure.[1]

The Folkland becomes *terra regis*.

The unit of the territorial division was the *tun*, township or *vicus*, occupied by a body of alodial owners associated by the tie of local contiguity, and also as representing either the original *mægth* community of allottees, or the dependent settlers on the estate of the immigrant chief. Each township had its *tun-gemôt*, or assembly of freemen, and a *tun-gerefa* as its head man or chief executive officer.[2] The townships were grouped together into *hundreds*, or as they were called in the Anglian districts, *wapentakes*. An aggregation of hundreds constituted the *shire*, and the union of shires made up the later kingdom.

Territorial divisions.

The Township.

The hundred, or Wapentake, a district answering to the *pagus* of Tacitus, probably has its origin in the primitive

The Hundred.

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[1] For a fuller description of Folkland and Bookland, see Allen, Royal Prerog. 135 *et seq.*

[2] 'The *tun* is originally the enclosure or hedge, whether of the single farm or of the enclosed village, as the *burh* is the fortified house of the powerful man. The corresponding word in Norse is *gardr*, our *garth* or *yard*. The equivalent German termination is *heim*, our *ham*; the Danish form is *by* (Norse, *bú* = German, *bau*).'—Stubbs, Const. Hist. i. 82. Cf. also the Flemish and Frisic *hem* and *um*.

settlements, varying in geographical extent, of each hundred warriors of the invading host. The term Wapentake, which clearly has reference to the armed gathering of the freemen, points to the military origin of the hundred, like that of the *hærred* in the Scandinavian kingdoms.[1] In England the names Hundred and Wapentake first appear in the laws of Edgar (A.D. 959-975) in connexion with the police organisation of the kingdom. By this time the term Hundred, originally denoting certain personal relations of the inhabitants of a district, had probably acquired its territorial signification as a subdivision of the shire or kingdom to which it belonged. It had its *hundred-gemot*, which took cognisance of all matters, criminal and civil, arising within the hundred, and was attended by the thegns of the hundred and by the representative townreve and four men from each township. The chief executive officer was the *hundred-man* or *hundreds-ealdor*, who convened the *hundred-gemot*. He was generally, and at first always, elective; but as the personal gradually gave way to the territorial influence, he was in many places nominated by the thegn or other great man to whom the hundred belonged.

Its organisation.

The Shire.

The division into Shires (a word originally signifying

[1] The difficulty in determining the principle upon which the hundreds were established is increased by the fact that they are most numerous in some of the smaller shires. Kent contains 61, Sussex 65, Dorsetshire 34 hundreds; while Lancashire has only six. A probable explanation of this disproportion, and a further argument in favour of a military origin, may be derived from the fact that the small southern counties were the districts first conquered, and therefore the most densely populated by the new settlers. The county of Kent is divided into six *lathes*, of nearly equal size, having the jurisdiction of the hundreds in other shires. The lathe may be derived from the Jutish '*lething*' (in modern Danish '*leding*')—a military levy. The singular division of Sussex into six 'rapes' (each of which is subdivided into hundreds), seems also to have been made for military purposes. The old Norse '*hreppr*' denoted a nearly similar territorial division. (See Lappenberg, England under the Anglo-Saxons, by Thorpe, i. 96, 107.) Two counties, Yorkshire and Lincolnshire, were divided into Trithings or Thirds (which still subsist in Yorkshire under the corrupted name of Ridings), and these were subdivided generally into wapentakes. [In Ireland, the division of Co. Cork into two Ridings, is quite modern, being due to the 4 Geo. IV. c. 93. *Cantreds* appear to have existed in Cork, *t.* Hen. II. In Cumberland and Westmoreland, Wards take the place of Hundreds. Sawyer, *Teut. Sett. in Sussex*, doubts whether the Rape is older than the Norman Conquest. Cf. Skeat, *s. v.* lathe.—ED.]

merely a subdivision or share of any larger whole) is very ancient, but the period at which it arose is uncertain. We have evidence that in Wessex the division into shires existed as early as the end of the 7th century, long anterior to the time of Alfred, to whom their institution has been popularly attributed. In the laws of Ina, King of the West Saxons (*cir.* A.D. 690), provision is made for the case of a plaintiff failing to obtain justice from his *scirman*, or other judge: if an ealdorman compound a felony it is declared that he shall forfeit his *scir;* and the defendant is forbidden secretly to withdraw from his lord into another *scir*. As Wessex gradually annexed the other kingdoms, these naturally fell into the rank of shires; or where they themselves had arisen from the union of several early settlements, were split up into several shires on the lines of the old tribal divisions.[1]

Organisation and officers.

The government of the shire was administered concurrently by an ealdorman, and the *scir-gerefa*, or sheriff. The Ealdorman (the *princeps* of Tacitus and the *comes* of the Normans) was originally elected in the general assembly of the nation; but there was a constant and increasing tendency to make the office hereditary in certain great families. On the annexation of an under-kingdom, the ealdormanship usually became hereditary in the old royal house; but in all cases, down to the Norman Conquest, the consent of the King and Witan was required at each devolution of the office. Sometimes several shires were administered by one ealdorman, but this arrangement did not involve an amalgamation of the separate organisations of each shire. The Sheriff (or as he was

The Ealdorman.

The Sheriff.

[1] On the various origin of the different historical shires or counties, see Palgrave, Commonwealth, p. 116; and Stubbs, Const. Hist. i. 109–10, who says: 'The constitutional machinery of the shire represents either the national organisation of the several divisions created by West Saxon Conquest; or that of the early settlements which united in the Mercian Kingdom, as it advanced westward; or the rearrangement by the West Saxon dynasty of the whole of England on the principles already at work in its own shires.' [The more carefully this statement is considered, the more difficult does it seem to be to avoid the conclusion that we practically know next to nothing about the origin of the Shire.—Ed.]

termed after the Norman Conquest, *vice-comes*—a title apt to obscure his independence of the ealdorman) was the special representative of the Regal or central authority, and as such usually nominated by the King.[1] He was judicial president of the *scir-gemot*, or shiremoot, executor of the law, and steward of the royal demesne.[2] At first the Sheriff seems to have exercised co-ordinate authority with the Ealdorman, but gradually the Civil administration became almost entirely concentrated in the former, leaving to the latter, as his principal function, the command of the Military force of the shire. Unlike the office of ealdorman, the sheriffdom, as a rule, never became hereditary. This circumstance was productive of important Constitutional effects after the Norman Conquest, as the Kings found ready to hand a machinery which enabled them to effectually assert the central authority in every shire, and thus to check the growth of local feudal jurisdictions.

The Burgh.

The *burh*, or town, was in its origin 'simply a more strictly organised form of the township. It was probably in a more defensible position; had a ditch or mound instead of the quickset hedge or "tun" from which the township took its name; and as the "tun" was originally the fenced homestead of the cultivator, the "burh" was the fortified house and court-yard of the mighty man—the king, the magistrate, or the noble.'[3]

Its organisation.

Other *burhs* were gradually developed out of the village township, or were founded on the Folkland. In these the

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[1] 'It is probable, on early analogy, that the gerefa was chosen in the folkmoot; but there is no proof that within historical times this was the case, although the constitutionalists of the thirteenth century attempted to assert it as a right, and it was for a few years conceded by the Crown.'—Stubbs, Const. Hist. i. 113.

[2] [The sheriff appears to be styled *Præpositus* (and is so taken by Stephen, *Commentaries*, 1880, iii. p. 284) in the Laws of Edward the Elder, c. 11, where his duties are thus defined: "Præpositus ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito: litesque singulas dirimito." On Sheriffs in Scotland, see Alexander Robertson, *Laws, Constitution, and Government of Scotland*, 1878, and *Law Magazine and Review*, No. ccxli., for Aug., 1881, art. by Sheriff Lees. On Sheriffs in Ireland, see *Law Magazine and Review*, No. ccxlix., for Aug., 1883, art. by W. H. Faloon, Q.C.—ED.]

[3] Stubbs, Const. Hist. i. 92.

municipal authority was similar to that of the free township. The chief magistrate was the *gerefa*, in mercantile places the *port-gerefa*, in others the *wic-* or *tun-gerefa*, who presided in the *burh-gemot*, or meeting of all the freeholders of the *burh*. In the larger towns, which were made up of a cluster of townships or lordships, the organisation more nearly resembled that of the hundred than that of the simple township.

The Guilds.

Side by side with the town constitution, and to a certain extent influencing its development, was the organisation of the municipal guilds. The ancient municipal guilds (so called from *gildan*, to pay or contribute) were voluntary associations for ecclesiastical or secular purposes, analogous to our modern clubs. By some the guilds have been regarded as an inheritance from the Roman municipal constitution; but an uninterrupted Roman descent can nowhere, in England, be traced. The similarity to be found in the oldest municipal denominations and institutions on both sides of the German Ocean points rather to a common origin in the ancient heathen sacrificial guilds, in which the common banquet, 'the cradle of many a political institution,' formed a leading feature.[1] The suppression of these devil's guilds (*deofol-gild*), as they were termed in the Christian laws, proving extremely difficult, they were for the most part continued with the substitution of Christian for heathen rites. Some guilds had for their principal object the mutual defence of their members and the preservation of peace; and by the laws of Ina and Alfred, in case of homicide of or by one of the members, the guild-brethren were to share in the receipt or payment of the *wergild*.[2]

The 'frith gild.'

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[1] Lappenberg, England under the Anglo-Saxons, by Thorpe, ii. 350.

[2] In the *Judicia Civitatis Lundoniae*, drawn up under King Althelstan (*cir.* 930) by the bishops and reeves belonging to London, and confirmed by the pledges of the 'frith-gegildas,' is preserved a complete code of a 'frith-gild' of the city of London, with minute directions for the pursuit and conviction of thieves, the exacting of compensation, and the carrying out of the dooms which Athelstan and the Witan had enacted at Greatley, Exeter, and Thundersfield.—Thorpe, Anc. Laws and Inst.; Select Chart. 65.

The merchant-guild.

But the form of guild which exercised the most permanent and extensive influence on the town constitution was the merchant-guild, *ceapmanne gild*, or *hansa*, to which all the traders of the town were, as a rule, obliged to belong. At first independent of the governing body of the town, the merchant-guild gradually coalesced with it, monopolising the rights which had originally belonged to all the free inhabitants. But the process was a very slow one, and though it began prior to the Norman Conquest, its principal development proceeded during the two centuries following that event. 'In the reign of Henry II.,' says Bishop Stubbs, 'there can be little doubt that the possession of a merchant-guild had become the sign and token of municipal independence; that it was in fact, if not in theory, the governing body of the town in which it was allowed to exist. It is recognised by Glanvill as identical with the communa of the privileged towns, the municipal corporation of the later age.'[1]

The City of London.

The City of London has always occupied an exceptional position, and though it has never stood to the rest of England in the same peculiar relation as Paris to the rest of France, it has just claims to be regarded, even in very early times, as 'a member of the political system.'[2]

Its constitution analogous to that of the shire.

Whilst the constitution of ordinary towns resembled that of the hundred, the constitution of London was analogous to that of the shire. From time immemorial the City has been divided into wards, answering to the hundreds in the shire, each having its own wardmot, answering to the hundred court, and its elected ealdorman. The chief municipal court—the general assembly of the citizens—was

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[1] Const. Hist. i. 418.

[2] Hallam, Midd. Ages, iii. 24 (11th Edit.). According to Roger Hoveden, the citizens of London, on the death of Ethelred II., joined with a portion of the nobility in raising Edmund Ironside to the throne. They concurred, say the Saxon Chronicle and William of Malmsbury, in the election of Harold I.; and in later times they took an active part in the civil war between Stephen and Matilda. They sided with the barons in their contests with the Crown, and assisted in deposing Longchamp, the chancellor and justiciar of Richard I. The mayor of London was one of the twenty-five barons empowered to maintain the provisions of the Great Charter.

called the *Hus-thing*, whence the modern name Husting, a term derived probably from the Danes, and signifying a court or assembly in a house as distinguished from one held in the open air. Side by side with the jurisdiction of the several wardmotes, landowners, both secular and ecclesiastical, possessed their exclusive sokens or jurisdictions within the city and its outlying liberties. These private sokens gradually gave way before the increasing power of the citizens; but while they existed, the inclusion of an aristocratic element within the municipality doubtless added much to its power and influence, until the citizens were strong enough to hold their own as a purely commercial community.

Towards the close of the pre-Norman period the two chief officers of the City of London, the representatives of the civic unity of the various wards, townships, parishes, and lordships of which it was composed, were the Port-reeve and the Bishop. It is to these two that the charter of William the Conqueror confirming to London the laws which it had enjoyed under King Edward is addressed: 'William the King greets William the bishop and Gosfrith the port-reeve,[1] and all the burghers within London, French and English, friendly: and I do you to wit that I will that ye twain be worthy of all the law that ye were worthy of in King Edward's day. And I will that every child be his father's heir after his father's day; and I will not endure that any man offer any wrong to you. God keep you.'[2]

Charter of the Conqueror to London.

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[1] 'The word *port* in *port-reeve* is the Latin "porta" (not portus), where the markets were held, and although used for the city generally, seems to refer to it specially in its character of a mart or city of merchants. The port-gerefa at Canterbury had a close connexion with the "Ceapmanne gild"; and the same was probably the case in London, where there was a cnihten-gild, the estates of which were formed into the ward of Portsoken. From the position assigned to the port-reeve in this writ, which answers to that given to the sheriff in ordinary writs, it may be inferred that he was a royal officer who stood to the merchants of the city in the relation in which the bishop stood to the clergy; and if he were also the head of the guild, his office illustrates very well the combination of voluntary organisation with administrative machinery which marks the English municipal system from its earliest days.'—Stubbs, Const. Hist. i. 404, n.

[2] *Munim. Gildhallae Lond., Lib. Custum.* [pp. 25, 247]; Select Charters, 79.

Ecclesiastical divisions.

The original bishoprics were conterminous with the limits of the various kingdoms at the time of the conversion to Christianity; but under Archbishop Theodore the dioceses were subdivided on the lines of the still earlier tribal divisions. As churches were gradually erected throughout the country, the township, or, in thinly populated districts, a cluster of small townships, naturally became in its ecclesiastical aspect the parish of a single priest. Later on the hundred became the deanery, the shire the archdeaconry, while the whole consolidated Kingdom formed the province of the Metropolitan.[1]

Ranks of the people.

Slaves.

Turning from the divisions of the land to those of the people, we find at the bottom of the social scale the mere slaves (*theowas*, *esnas*), of whom, under the name of *servi*, 25,000 are numbered in Domesday Book, or nearly one-eleventh of the registered population. These were of two kinds—(1) hereditary, consisting partly of the descendants of the conquered Britons, partly of persons of the common German stock either descended from the slaves of the first colonists or from freemen who had lost their liberty; (2) penal slaves (*wite-theowas*), freemen who had been reduced to slavery on account of crime, or through failure to pay a *wergild*, or by voluntary sale,—the father having power to sell his child of seven, and a child of thirteen having power to sell himself.

Freemen: Eorls and Ceorls.

As among the Germans of Tacitus we find the distinction between the noble and common freeman, so among the English the freemen were broadly divided into *eorls* and *ceorls*, the modern meaning of which may be rendered by *gentle* and *simple*, or esquire and yeoman.

The *Eorl*.

Nobility by birth gives way to nobility by service.

The rank of the *eorl* rested upon noble birth, and thus formed a perpetual barrier between him and the *ceorl*. But in England, as in other Germanic countries, a new kind of nobility speedily grew up—nobility by military service, which in the end superseded the nobility by birth. This

[1] Stubbs, Const. Hist. i. 224–227. [This theory seems to break down at the Metropolitanate, and by 'deanery' must be meant 'Rural Deanery.'—ED.]

arose out of the development of the *comitatus*, described by Tacitus, the band of personal followers of the King or other leader. These followers were the *gesithas* (= companions); their leader was the *hlaford* (= loafgiver), in its modern form, Lord, whose title was derived from his character of giver of gifts in acknowledgment of the services received. The relation existing between the lord and his followers appears to have gradually assumed a somewhat lower type; the *gesith*, or companion, became the *thegn* (= servant[1]); and the service of the King, or other great lord, was eagerly sought by freemen as well for the social dignity as for the material rewards which it ensured. We read of the King's dish-thegn (*disc-thegn*), bower-thegn (*bur-thegn*), and horse-thegn or stallere,[2] as personages of high rank and great influence; a feature in our early institutions which has survived to the present day in such offices as those of Lord Chamberlain (bower-thegn) and Master of the Horse. Service to the King, or some great lord, gradually became the only avenue to distinguished rank. The word *thegn* itself came to be regarded as synonymous with noble or gentle. Among this nobility by service the highest rank comprised the King's thegns, whilst in a lower class were the thegns of the ealdorman or bishop.[3]

The Comitatus.

Gesith.

Thegn.

The dignity of thegn was closely (though not inseparably) connected with the possession of landed property;[4] so

Intimate connexion between social status and ownership of land.

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[1] [That *thegn* = servant is denied by Mr. A. G. Little, *English Historical Review*, No. 16, for Oct., 1889, 'Notes and Documents, Gesiths and Thanes,' p. 724, *n.* 7, where he says that 'to derive þegn from þênian, to serve, is to put the cart before the horse,' and refers to Mayhew and Skeat, *Dict. of Middle English*, *s. v.* *þenien*. He connects it rather with *þihan*, to grow, so that *thegn* would mean boy or young man. Still he cites the official 'dish-thegn' and 'bower-thegn,' who can hardly have been boys, and he admits that the *thegn* 'was probably, unlike the gesith, a servant in the royal household.' This seems to bring us back very near the conception of service as inherent in the origin of the Thane.—ED.]

[2] The Staller (*comes stabuli*) = the Marshal (from O. H. G. *marah*, horse, and *scalh*, servant). [Thorpe, *n.* to Lappenberg, A.-S. ii. 312.]

[3] See Kemble, Saxons in England, i. ch. vii., 'the Noble by Service.'

[4] [In Scotland, to all appearance, at least between the 11th and 15th centuries, the Thane ranked below the Earl and the Baron. Several Thanedoms are traceable quite late in Scottish history. See E. W. Robertson, *Scotland under her Early Kings*; W. F. Skene, *Celtic Scotland*; Innes,

much so that the possession of a certain quantity of land came to be regarded as a foundation of nobility. The simple freeman who acquired five hides of land entered into the ranks of the thegnhood.[1] For the position of ealdorman the possession of at least forty hides was necessary. This intimate connexion between social status and the ownership of large landed estates, which has continued with but slight modification down to our own times, may be traced even in the original institutions of our Teutonic ancestors: *Agri . . . . quos inter se secundum dignationem partiuntur.*[2]

Effects of growth of the thegnhood.

The development of the *comitatus*, or thegnhood, had very important effects. In the original Teutonic community, the monarchic and aristocratic elements were subordinate to the democratic element. The growth of the Thegnhood, working in close alliance with the Kingly power, which from motives of self-interest it was bound to support as the source of its own dignity, reversed this original relation. Thus the aristocratic and monarchic elements obtained a decided pre-eminence. Purely voluntary in its

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Book of the Thanes of Cawdor; G. Burnett, *Exchequer Rolls of Scotland*, vols. vi.–xii.; Davidson, *Inverurie and the Earldom of the Garioch;* and *Ret. Scot. Abbrev.*—ED.]

[1] [Mr. Little, *Eng. Hist. Rev.*, No. 16, pp. 726, 728, argues that the passages on which Stubbs, following Maurer, based the doctrine that mere possession of five hides constituted thanehood, do not bear out the conclusion, and submits that this was 'simply, in the seventh century, the normal, traditional holding of a royal thegn—a member of the upper class of the *comitatus*.' This, even if allowed to be the truer view, is not destructive of the statement in the text of the present work, that 'possession of a certain quantity of land came to be regarded as a foundation of nobility.' But it would seriously modify the subsequent statement that a 'simple freeman,' acquiring that quantity of land 'entered,' clearly *ipso facto*, 'into the ranks of the thegnhood.' It remains to be seen how far Mr. Little's somewhat destructive criticism will win acceptance. He does not offer another theory in place of that of Maurer: he only urges, with some apparent show of reason, that the texts cited in its support do not sufficiently bear out the inferences which have been drawn from them, and therefore bids us suspend our judgment. There is an admitted doubt as to the date of the passage from the *Wergelds*, which Kemble assigned to the 10th cent., and the first passage, of uncertain date, known as the 'ranks,' connects the five-hide thaneright with a specific duty in the King's hall. This, Mr. Little argues, 'can scarcely be twisted into a proof that at a later time the possession of five hides without this duty conferred the same rank.' But it is still true to say, as was said by the author in the margin of the present work, that there was an 'intimate connexion between social status and ownership of land.'—ED.]

[2] Tacit. Germ. c. xxvi.

origin, service rapidly grew to be universally compulsory. It soon came to be regarded as a principle that every freeman, not being a *hlaford*, must be attached to some superior, to whom he was bound by fealty, and who, in return, was his legal protector and the guarantee for his good behaviour. The freeman had indeed the right of choosing the lord to whom he should, in technical language, *commend* himself; but if he failed to do so, his kindred were bound to present him to the shire court and name a lord for him. The lordless man was treated as a kind of outlaw, and might be seized like a robber by anyone who met him. Having once commended himself to some lord, the freeman was prohibited from exchanging into the service of another lord in another shire without the consent of the ealdorman of the shire which he was desirous of quitting. Thus, 'a new order of things,' says Kemble,[1] 'was consummated, in which the honours and security of service became more anxiously desired than a needy and unsafe freedom; and the alods being finally surrendered, to be taken back as *beneficia*, under mediate lords, the foundations of the royal, feudal system were securely laid on every side.'

The *Ceorls.*

In one respect the absorption of Eorldom into Thegnhood had a liberalising effect.[2] The *ceorl*, who could never become an *eorl*, might become a *thegn*, and so attain a rank practically equivalent to that of eorl. Thus the caste distinction of birth was broken through. The ceorl who acquired five hides of land (about 600 acres), with a church and mansion of his own, acquired also, as we have seen, the

[1] Saxons in England, i. 184.

[2] [That there was a great extension of the Thanehood after Alfred's time is admitted on all hands. That it was really connected with Alfred's 'sweeping reforms' is suggested by Mr. Little, *Eng. Hist. Rev.*, *u.s.* Its precise nature and causes cannot yet be safely laid down, and its effects were probably mixed. But that there was anything which could fairly be described as an 'absorption of Eorldom into Thegnhood,' seems to us, on reconsidering the questions connected with the Thanehood, difficult to admit. The olden prestige of the Earl was no doubt weakened: it was shaken, but not destroyed. Earls and Thanes alike survived the Norman Conquest, after which, indeed, the Earl again got the upper hand in England. It is to mediæval Scotland that we have to look for the survival of the Thane, long after he has disappeared from England. Cf. *Exch. Rolls*, *Scot.*, *u.s.*—ED.]

right to thegnhood. King Athelstan extended the privilege to the merchant who in his own vessel had made three voyages to foreign parts. This last was a remarkable exception, in favour of commerce, to the general polity of this period, in which the possession of land was almost essential to dignity and perfect freedom. On the whole, however, the ceorls as a class were probably depressed by the growth of the thegnhood.[1] As there were degrees among the thegns, so among the ceorls there were various grades, according to the different relations in which they stood towards the hlafords, under whom they had placed themselves. Some had land, which again varied greatly in quantity; some were landless. The landless ceorl indeed was practically little better off than the slave, except that he might commend himself to any lord he pleased; but still all ceorls were freemen and capable of becoming gentlemen. They were 'law-worthy,' and the *wer* of the lowest ceorl was payable to his kindred, not to the lord, to whom the composition for the murder of a slave would have belonged. In the Domesday Survey the name of ceorl does not occur; but the class is mentioned under the names of *liberi homines*, *socmanni*, *villani*, *bordarii*, *cottarii*, and *cotseti*, indicating doubtless some peculiarity of service or tenure. They are always distinguished from the *servi* or serfs of the demesne. The socmen were probably ceorls who had acquired less than five hides of freehold land. They may be regarded as 'the root of a noble plant, the free socage tenants, or English yeomanry, whose independence has stamped with peculiar features both our constitution and our national character.'[2]

Ealdormen. Above the thegns in dignity were the Ealdormen. In the primitive patriarchal constitution the chief authority in

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[1] Freeman, Norman Conquest, i. 95—7. [Chapter iv. in Mr. J. F. Morgan's *England under the Norman Occupation*, 1858, entitled The Hall, the Church and the Peasantry, gives a graphic picture, from Domesday and other Records, of the condition of both thanes and ceorls at the time of the Norman Conquest.—ED.]

[2] Hallam, Midd. Ages, ii. [274].

each tribe seems to have been naturally exercised, in times of peace, by the eldest member. Hence the chief of the tribe was emphatically called the Ealdorman. When the chiefs of the Teutonic settlers assumed the regal style, the title of Ealdorman gradually became restricted in its signification. From the time of Egbert it denoted a magistrate or viceroy appointed by the King and his Witan, more especially the governor of a shire or large district. Under the Danish Kings in the 11th century, the title of Ealdorman was generally supplanted by that of Eorl or Earl, as the official title of the governor of a shire or province.[1]

By this time the word *eorl*, in its original signification of gentle birth, had, as we have seen, itself been supplanted by *thegn*. From about the period of the Norman Conquest the title of Ealdorman underwent a further restriction, and has survived to our days only as the designation of city and borough magistrates.[2]

The Clergy.

As the result alike of their almost entire monopoly of learning and of the veneration, not unmixed with superstition, which the sacerdotal character inspired in the laity, the clergy, as a class, held a very high political and social status.[3] The poorest priest ranked as a mass-thegn; the

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[1] The title of *eorl* occurs early in the laws of the Kentish kings (Laws of Ethelbert, xiii., xiv.), and was probably of Jutish origin, but its use as a substitute for ealdorman was borrowed from the Danish *jarl*.

[In Scotland, the title of Earl was no doubt of Scandinavian origin, and was accepted as the equivalent of the Celtic *maormor* (or *mormaer*, as Skene writes it). The Latin form was in each case *Comes*. The Seven Earls appear for several centuries to have been a sort of Constitutional body in the Scoto-Pictish kingdom. See E. W. Robertson, *Scotland under her Early Kings*, and Skene, *Celtic Scotland*.—ED.]

[2] [It has also been, somewhat grotesquely, but without any apparent sense of the ludicrous, applied to certain members of the new County Councils, of which some writers, presumably of an antiquarian turn of mind, have spoken as though they were *bonâ fide* revivals of the old shire-moot. Had this been really intended, in theory at least, the chairman would have been the 'Alderman,' and the position ought in that case, perhaps, to have been filled by the County officer now called Lord Lieutenant. But we do not know what title could have been found, on Anglo-Saxon principles, for the Deputy-Chairman, or where an authority would have been found for his salary. How far it is possible in these days to restore features of the Anglo-Saxon Polity, and how far, if possible, it would be desirable, are questions which need not here be entered upon.—ED.]

[3] Lappenberg (England under the Anglo-Saxons, by Thorpe, ii. p. 322) suggests, as a further explanation of the high position of the Christian priest-

Bishop was on a par with the Ealdorman and presided with him in the shire-moot, and the Archbishop was never valued, in the eye of the law, at less than an Atheling, or member of the King's family. Whilst all laymen, even of the highest rank, were bound to find a number of compurgators in addition to their own oath, in order to clear themselves from a charge, the simple oath of a priest was accepted as sufficient. The Archbishop, like the King, merely gave his word, without an oath. In every Great Council the prelates appear to have taken a prominent part, Church and State working together in the closest alliance; while for purely Church matters, the clergy, from an early period, had their own Synods.

The King.

At the head of the nation was its elected chief and representative, the Cyning, or King.[1] At the period of which we are now treating, the English kingship was in a transition stage between the old Teutonic type and the later mediæval type, into which it developed in the reign of Henry II. The people were still the source of power, and the King was their minister, not their master. The Royal power was strictly limited by that of the Witan or National Council, which, though not a representative assembly in the modern acceptation of the word, stood in relation to the King as the representative of the people. All the laws of

Limited nature of English Kingship.

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hood, the account given by Tacitus of the vast influence in secular affairs possessed by the Pagan German priesthood, in whom exclusively resided the power of life and death. 'Such a primitive influence tended, no doubt, greatly to facilitate the domination of the Roman papal church, and a part of their jurisdiction, the ordeals or so-called judgments of God, may have had their origin in the legal usages of the heathen priests.'

[1] The meaning of the word *cyning* or *king*, has been explained [by some writers] as 'child of the race,' from *cyn*=race or kin, and *ing* the well-known patronymic. (Allen, Royal Prerog. p. 176; Freeman, Norm. Conq. i. 82). In the Rigsmal, where 'Kon' is the son of 'Jarl,' the historical development of the King from the Earl seems to be hinted at. Max Müller (Lectures on the Science of Language, ii. 282, 284), decides that 'the old Norse *konr* and *konungr*, the old High German *chuninc*, and the Anglo-Saxon *cyning*, were common Aryan words, not formed out of German materials, and therefore not to be explained as regular German derivatives. . . . It corresponds with the Sanscrit *ganaka*. . . . It simply meant father of a family.' 'But,' as observed by Bishop Stubbs (Const. Hist. i. 140), 'the Anglo-Saxons probably connected the *cyning* with the *cyn* more closely than scientific etymology would permit,' [though, as Max Müller shews, it is *not* 'child of the race.'—ED.]

the kings express the assent of this council, and there are even instances of Royal grants of public land made without its concurrence, being revoked. With the extension of the national territory and the growth of the thegnhood, the personal dignity and power of Royalty gradually but steadily increased. The King became the personal lord as well as the chief and representative of his people. From the time of Athelstan the kings began to assume Imperial titles, with which the extensive European connections of that sovereign had doubtless rendered them familiar.[1] These titles were probably not mere grandiloquent sounds, but were intended to proclaim the Imperial character of the sway which the King of the English asserted over the inhabitants of the whole island, and his independence of any external potentate.[2] In his Imperial character, as overlord, the King called himself *rex, imperator, casere, basileus, totius Britanniae* or *totius Albionis;* but in his Regal character he is still King of his people, not lord of the soil —*rex Anglorum*, not *rex Angliae.*[3] The prerogatives and immunities of the King were extensive. Like every other individual, he had originally a *wer-gild*, or fixed price for his life; but Alfred made plotting against the King's life 'death-worthy.' He was entitled to maintenance for himself and retinue in public progresses; to all treasure-trove, wrecks, tolls, the profits of markets, mines, and salt-works, and to the forfeited possessions of outlaws. A *wite*, or fine, was also payable to him, on every breach of the law, in

Gradual increase in Royal power and dignity.

Assumption of Imperial titles.

Royal prerogatives and immunities.

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[1] Five of Athelstan's sisters were married to foreigners: (1) Eadgifu, to Charles the Simple, the titular Carolingian King of the West Franks; (2) Eadhild, to Hugh the Great, founder of the house of Capet; (3) Eadgyth, to the Emperor Otho I.; (4) Eadgifu, to Louis, King of Arles; and (5) Ælfgifu, to the head of the house of Montmorency. [There are acknowledged doubts among genealogists as to the names of the parties, and as to the real facts of some of these marriages.—Ed.]

[2] [This may be partly true, but the titles of Imperial import used in charters of the later West Saxon Kings have very much the ring of the clerkly style of a Chancery following Roman and Byzantine models. They would, of course, be at once explained, if they could be proved to be an inheritance from the Roman dominion in Britain.—Ed.]

[3] On the Imperial character of the early English kings, see Palgrave, Eng. Commonwealth pp. 627, cccxlii-cccxliv.; and Freeman, Norman Conq. i. 148.

addition to the compensation (*bot*) due to the person injured. The breach of the King's *frith* or peace, and the violation of his *mund*,[1] or special security granted to any one, were severely punished. He alone had *sac*, or jurisdiction, over persons of the highest rank. Together with the duty of executing justice in the last resort he possessed the prerogative of mercy. He was commander-in-chief of the national host (*fyrd*), and might accept of money compositions in lieu of personal service. With regard to certain classes of offences he was even clothed with an arbitrary jurisdiction, and might either slay, fine, imprison, or banish the culprits, at his own pleasure.

The Queen.

The consort of the king, in accordance with the high respect in which women were held by the Germans, seems to have occupied a very exalted position. She was styled emphatically 'the wife' (*cwen*) and lady (*hlæfdige*). Her privileges and possessions were probably considerable, although we have but few specific details concerning them. The crimes of Edburga, who poisoned her husband King Brihtric, caused the West Saxons, for a considerable period, to withhold from the King's wife the name and authority of queen. In 856 Ethelwulf gave deep offence to his people by causing his second wife, Judith, to be crowned; but from the date of Edgar's second marriage with Elfrida, in 965, the rank of queen appears to have been restored. Emma, wife and Queen of Ethelred II., seems to have held the city of Exeter as her peculiar property, and to have governed it by her own officers. In Mercia and East-Anglia the queen-consort was entitled to the payment of an extra tenth, called *aurum reginae* (*gersuma*), or queen-gold, on every fine or oblation of more than ten marks paid to the king. This ancient due was claimed so late as the time of Charles the First, by Queen Henrietta Maria.[2]

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[1] The original signification of 'mund' is *hand*. It specially denoted the power of the head of the family over his wife, children, and slaves, in which sense it may be compared with the similar use of *manus* in the ancient legal phraseology of the Romans. [Stratmann, *Dict. O. Eng. Lang.*, 3rd ed. 1878, *s.v.*, gives the meanings, mound, palm, protection.—ED.]

[2] Lappenberg, A.-S. ii. 310, 311. On 'Queen' and 'Lady,' see Freeman,

The sons and brothers of the King were distinguished by the title of Athelings. The word Atheling, like Eorl, originally denoted noble birth simply; but, as the Royal House of Wessex rose to pre-eminence, and the other Royal houses and the nobles generally were thereby reduced to a relatively lower grade, it became restricted to the near kindred of the national King. The more remote members of the Royal house fell into the ranks of the ordinary nobility without any distinctive appellation, on the same principle as [that by which] the descendant of an English nobleman at the present day, if not heir to the ancestral title, bears, in the third generation, no external sign of his noble relationship. The Athelings ranked above the rest of the nobility; the penalty for a violation of their rights being generally fixed at one-half of that payable for a similar offence against the King.

The Athelings.

The Supreme Council of the nation, the representative of the Teutonic national assembly described by Tacitus, and the progenitor of our own Parliament, was the *Witenagemot*, or Meeting of the Wise.

The Witenagemot, or Supreme Council of the nation.

Concerning the constitution of this assembly, there exists considerable difference of opinion. It is admitted that in the local *gemots* every freeman had a right to attend. In the *gemot* of his own mark or township—whose modern representative is the parish vestry—every Teutonic freeman was entitled to a voice. So every freeman, whether eorl or ceorl, had a voice in the folkmoot of the shire, the shiremoot or county court of later times. But here the divergence makes itself manifest. According to one view [1] every freeman had also the right to attend the National Assembly, although this right had practically gone out of use at an early period. The *Witenagemot* was 'democratic in ancient theory, aristocratic in ordinary practice,'

Its constitution.

Norm. Conq. iv. 768; Appendix X. [Stratmann, *O. E. Dict.*, simply explains *gærsume* as treasure. Morgan, *Eng. under Norm.*, p. 47, cites Little Domesday, 353, to shew that wherever the return for land was in gold or silver, it was called *gersum*. The *gersuma* is also familiar in mediæval charters of lands.—Ed.]

[1] Freeman, Norm. Conq. i. 107.

a view which, to a certain extent, is supported by the high authority of Kemble.[1] According to another view[2] the central assembly was never formed on the model of the lower courts as the folkmoot of the whole nation, the ordinary freemen never rising higher than their respective shiremoots; but yet, constructively, the Witenagemot represented the whole people, whose rights, as against the King, were all vested in this assembly.

Whatever may have been its theoretical constitution, there is no doubt that practically it was an aristocratic body. Its members were the King, the Ealdormen, or governors of shires, the king's thegns, the Bishops, Abbots, and generally the *principes* and *sapientes* of the kingdom. *Sapientes* = witan = wise men, was the common title of those who attended it. The lesser thegns, if entitled to be present, did not, probably, attend in any numbers, so that the assembly can never have been very large. 'The largest amount of signatures,' says Kemble, 'which I have yet observed is 106, but numbers varying from 90 to 100 are not uncommon, especially after the consolidation of the monarchy. In earlier times, and smaller kingdoms, the numbers must have been much less. . . . Other meetings, which were rather in the nature of conventions, and were held in the presence of armies, may have been much more numerous and tumultuary,—much more like the ancient armed folkmoot on the famous day which put an end to the Merwingian dynasty among the Franks. Such, perhaps, was the gemót which, after Eádmund Irensída's

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[1] Kemble (Saxons, ii. 239, 240), after quoting from charters expressions which would seem to imply the presence and consent of the mass of the people in the national assembly, remarks: 'Whether expressions of this kind were intended to denote the actual presence of the people on the spot; or whether *populus* is used in a strict and technical sense—that sense which is confined to those who enjoy the full franchise, those who form part of the πολίτευμα—or finally, whether the assembly of the witan making laws is considered to represent in our modern form an assembly of the whole people, it is clear that the *power of self-government is recognized in the latter.*'

[2] Stubbs, Select Chart., Introductory Sketch, 10, 11; and Const. Hist. i. 119—127.

death, elected Cnut sole king of England, or that in which Earl Godwine and his family were outlawed.'[1]

Although the Witenagemot was not a Representative body in the modern sense, it was unquestionably looked upon as representing the whole people and consequently the national will.[2] The ancient principle of representation, after a period of obscuration, was restored in another shape by De Montfort and Edward I., in the 13th century.

Its powers.

The powers of the Witenagemot were most extensive, greater even than those of the modern Parliament.

Deposition of the King.

(1) It had the power of deposing the King for misgovernment.[3] So great a step would obviously only be taken at rare intervals. In Northumbria, indeed, the deposition of Kings, with more or less of violence and bloodshed, is extraordinarily frequent; but two only, Ethelwald (probably) in 765, and Alcred (certainly) in 774, can be said to have been regularly deposed by the Witenagemot.[4] In the Royal line of the West Saxons, which grew into the Royal line of the English, there were altogether three instances of deposition by the Witan before the Norman Conquest. In 755, Sigebert of Wessex was deposed by the Witan, and Cynewulf, his kinsman, elected in his stead.[5] Ethelred II. was in like manner practically deposed in 1013, and again restored in 1014;[6]

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[1] Kemble, Saxons in England, ii. 200, 201, n.

[2] In a charter of Athelstan, in 931, the act is said to have been confirmed 'tota plebis generalitate ovante'; and the act of a similar meeting at Winchester in 934, which was attended by the King, four Welsh princes, two archbishops, seventeen bishops, four abbots, twelve dukes, and fifty-two thegns, making a total of ninety-two persons, is described as being executed 'tota populi generalitate.'—Kemble, Sax., ii. 199. [Cf. *Cod. Dip.*, Nos. 1103, 364.—Ed.]

[3] Kemble, Saxons, ii. 219.

[4] Alcred, 'consilio et consensu suorum omnium, regiae familiae ac principum destitutus societate, exilio imperii mutavit majestatem.' Sim. Dun. ann. 774. Of fifteen Kings of Northumbria in the 8th century, thirteen ended their reigns by extraordinary means. See the list in Stubbs, Const. Hist. i. 137.

[5] Chron. Angl.-Sax. ann. 755; Flor. Wigorn. ann. 755; and Kemble, Saxons, ii. 219.

[6] Flor. Wig. ann. 1013, 1014; Chron. Angl.-Sax. 1014. The ealdormen of Wessex and all the thegns of the West came to Swend at Bath and submitted to him, giving hostages. 'Putting the language of the different accounts together,' says Freeman (Norm. Conq. i. 396), 'there can be little doubt that this was,

and in 1037 Harthacnut (who had reigned as King of the West Saxons while his brother Harold reigned to the north of the Thames, probably with a supremacy over the whole kingdom) was deposed in Wessex and Harold chosen King over all England.[1] Since the Norman Conquest, the deposing power has been three times exercised by the National Parliament, in the cases of Edward II. in 1327, Richard II. in 1399, and James II. in 1688.[2]

Election of Kings.

(2) The Witenagemot had the power of electing the King. All the old Teutonic Kingdoms were elective; but in every kingdom there was a Royal family, out of which the Witan had the right to elect the most competent member to discharge the functions of king. The eldest son of the last king, if of full age and not manifestly incompetent, was usually chosen to succeed his father. But at a period when the personal character and military prowess of the King were of the utmost importance, minorities were too dangerous to be endured. Thus Ethelred I., in 866, was chosen in preference to the issue of his elder brother; and at his own death in 871, leaving only young children, was himself succeeded by his younger brother Alfred. King Athelstan, again, though reputed illegitimate, was preferred in 925 to the younger but legitimate sons of Edward the Elder.[3] In 946, Edwy, son of Edmund, was passed by in favour of his uncle Edred; but on Edred's death in 955 was elected to the exclusion of that king's issue. In 1042, Edward the Confessor was chosen in preference to the absent son of his elder brother, Edmund Ironside.

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or professed to be, a formal act of the Witan of Wessex, deposing Ethelred and raising Swend to the throne.'

[1] Chron. A. Sax. ann. 1037 (Earle, p. 166).

[2] *Infra*, Chap. vi. Henry VI. was not, strictly speaking, deposed by Parliament. When Richard, Duke of York, claimed the throne, a parliamentary compromise was come to between them: and Henry, who was looked upon by the Yorkists as having broken this compromise, was ultimately set aside by a purely partisan assembly. Charles I. was never deposed, but tried and executed *being king*, [for which, and for the deposing power, cf. Freeman, Norm. Conq. i. 114—115.]

[3] Illegitimacy, however, says Kemble, 'was not considered a valid ground of objection among the Anglo-Saxons, if the personal qualities of the prince were such as to recommend him.'—Saxons in England, ii. 37, n.

Finally, in 1066, the whole Royal house was passed by, and Earl Harold, the most able general and statesman of his time, was elected King. The race of Cerdic had once before been passed by, when, in 1017, Cnut was chosen King; but this election, though good in form, was made under duress. A certain preference seems to have been given to the issue born after the accession of the father to the throne —the *porphyrogeniti*, sons born in the purple; and a certain preference was also acquired by the *recommendation* of the last king: thus Edgar recommended his son Edward to the Witan, and Edward the Confessor recommended Earl Harold.[1] But on every fresh accession 'the great compact between the king and the people was literally, as well as symbolically, renewed, and the technical expression for ascending the throne is, being "gecoren and áhafen tó cyninge," elected and raised to be King; where the *áhafen* refers to the old Teutonic custom of what we still at election times call chairing the successful candidate; and the *gecoren* denotes the positive and foregone conclusion of a real election.'[2]

The Witan participated in every act of government.

(3) The Witenagemot had a direct share in every act of government. In conjunction with the King, the Witan enacted laws and levied taxes for the public service; made alliances and treaties of peace; raised land and sea forces when occasion demanded; made grants of folkland; appointed and deposed the bishops, ealdormen of shires, and other great officers of Church and State; adjudged the lands of offenders and intestates dying without heirs to be forfeit to the king; and authorised the enforcement of Ecclesiastical decrees. Lastly, the Witan acted from time to time as a Supreme Court of Justice, both in civil and criminal causes.[3]

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[1] See Freeman, Norm. Conq. i. 118.

[2] Kemble, Saxons in England, ii. 215.

[3] See Kemble, Saxons in England, ii. 204—240, where numerous examples will be found of the exercise by the Witan of all the powers enumerated in the text. These powers were grouped by him into the following twelve canons: *Kemble's Canons on the powers of the Witan.*

i. 'First, and in general, they possessed a consultative voice, and right to consider every public act, which could be authorised by the King.

These extensive powers not invariably exerted :

But although the powers of the Witan were so extensive, the active exercise of them varied greatly with the personal character and influence of each occupant of the throne. Strong kings, like Alfred and Athelstan, were able, by the legitimate exercise of personal influence, to lead the Witan in whatever direction they pleased, and thus to attain the practical enjoyment of supreme power. Towards the close of the pre-Norman period, many of the powers which had been originally shared by the King and the Witan, were in fact exercised by the King alone ; but in the two cardinal matters of legislation and the imposition of extraordinary taxation, the right of the Witan to give counsel and consent was at all times recognised.

except in legislation and taxation.

Judicial system.

The great original principle of the English Judicial system was that of trial in local courts popularly constituted, or as it was termed in later times, trial *per pais*, in the presence of the country, as opposed to a distant and unknown tribunal. This was at once an evidence of freedom and the surest guarantee for its permanence. But before describing the different local courts, it is necessary to notice, shortly, the principle of pledges, by which provision was made that every man should be either personally forth-

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ii. The Witan deliberated upon the making of new laws which were to be added to the existing folcriht, and which were then promulgated by their own and the King's authority.

iii. The Witan had the power of making alliances and treaties of peace, and of settling their terms.

iv. The Witan had the power of electing the King.

v. The Witan had the power to depose the King, if his government was not conducted for the benefit of his people.

vi. The King and the Witan had power to appoint to vacant sees.

vii. They had also power to regulate ecclesiastical matters, appoint feasts and festivals, and decide upon the levy and expenditure of ecclesiastical revenue.

viii. The King and the Witan had power to levy taxes for the public service.

ix. The King and his Witan had power to raise land and sea forces, when occasion demanded.

x. The Witan possessed the power of recommending, assenting to, and guaranteeing grants of lands, and of permitting the conversion of folcland into bócland, and *vice versa*.

xi. The Witan possessed the power of adjudging the lands of offenders and intestates to be forfeit to the King.

xii. Lastly, the Witan acted as a Supreme Court of Justice, both in civil and criminal causes.'

coming, or have some representative bound to answer for him, in every case of litigation.

The *Frithborh*, or *Frankpledge.*

A collective responsibility for producing an offender appears originally to have lain upon the *mægth* or community of the kindred;[1] it then devolved upon the voluntary associations called *guilds;* and later on the guild was superseded by the local responsibility of the *tithing*, the exact nature of which is doubtful, but which seems to have been a personal and territorial subdivision of the hundred practically identical with the township. Eventually, though probably not much earlier than the Norman Conquest, for the local tithing was substituted the personal collective *Frithborh*, or Frankpledge. Every freeman, not being a hlaford, was bound to be enrolled in a frith-borh, or *tenmannetale* as it was called in the North; that is, an association of ten men who formed a perpetual collective bail for the appearance of any one of their number when required to answer in a court of law. Each association had its head-man, the *borhs-ealdor*, or *frith-borgehead*, who was also called the *tithing-man*, as the body of ten was also called the *tithing*. If an accused member appeared and was condemned, he had to make reparation by his own property or by personal punishment; but if he fled from justice, the other members of the tithing, in default of exculpating themselves from all share in his crime or escape, were pecuniarily liable for the penalty.

Responsibility of the *Hlaford* for his dependents.

Side by side with the collective responsibility of the local community or of the personal association, was the individual responsibility of the *hlaford* for his men. By a law of Athelstan, every landless man was to have a lord to answer for his appearance; and by an ordinance of King Edgar it was enacted: 'Let every man so order that he have a "borh" [surety]; and let the "borh" then bring and hold him to every justice; and if any one then

[1] Schmid notes, however (Ges. d. A.-Sachs.), that the wife did not enter her husband's mægth on marriage, but remained in her own, and her kindred alone made compensation.

do wrong and run away, let the "borh" bear that which he ought to bear. But if it be a thief, and if he can get hold of him within twelve months, let him deliver him up to justice, and let be rendered unto him what he before had paid.'[1]

Courts of the Hundred and the Shire.

The Hundred-moot.

The two principal local courts were those of the hundred and the shire. The Hundred court was held once a month, under the presidency of the hundred-man, or hundreds-ealdor.[2] The judges of the court were originally the whole body of freeholders within the hundred; but, probably from motives of convenience, it soon became the custom to delegate the judicial powers of the whole body of suitors to a representative committee, generally twelve or some multiple of twelve in number, and either chosen for the occasion or permanently appointed. The Court of the Hundred exercised jurisdiction both civil and criminal, voluntary and contentious; and litigants were bound to seek justice in this court before applying to a higher tribunal. As the King was entitled to a *wite*, or fine, for every offence, his reeve was accustomed to attend the court twice in each year. On the institution of the frithborh or frankpledge, the hundred court, on the two yearly occasions when it was attended by the reeve, undertook the duty of seeing that every man was regularly enrolled in his tithing, a practice which continued long after the Norman Conquest as the Sheriff's Tourn, or Leet, and View of Frankpledge.

Private jurisdictions.

From an early period certain districts within the hundred were detached from its jurisdiction and subjected to the *socn* of the Church or of the secular hlafords to whom they belonged. Such districts formed private *franchises* or *liberties*, and the name '*sithesocna*,' by which they were sometimes denoted, points to their origin in grants made

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Edgar's Ordinance of the Hundred, cap. 6. On the origin and nature of the Tithing and the Frithborh or Frankpledge—the subject of a great liter a-ture—see Stubbs, Sel. Chart. 68, and Const. Hist. i. 86—88.

Supra, p. 18.

by the King to his *sith* or *gesith*, and at a period before the title of gesith had been supplanted by that of thegn. The hlaford possessing a private soken over his lordship, or manor as it was subsequently termed, was wont to dispense justice in the hall of his mansion, whence his court was called a hall-mote, the progenitor of the feudal court-baron, which is not even now extinct. Sometimes the jurisdiction of a whole hundred, or of several hundreds, was granted to churches or private individuals. In this way the organisation of the hundred was considerably weakened, and the administration of justice became to a large extent not national or royal, but territorial and feudal.

The Shire-moot.

The *Scir-gemot*, or, as it was called after the Norman Conquest, the County Court, was not only the court of the shire, but also the *Folc-gemot*, the general assembly of the folk of the shire, a name which points to the original independence of the population of each shire.[1] The shire-moot was convened by the sheriff twice in the year. It was attended by the Ealdorman, the Bishop, and all other public officers, by all lords of lands, and by the representative reeve and four men and the parish priest from each township. These, collectively, formed the judges of the court; but as in the hundred, so in the shire, the twelve senior thegns acted as a body of councillors or assessors, and declared the report of the shire. The jurisdiction of the shiremoot extended to every kind of suit, except such as concerned a high officer of state, or a king's thegn, which

[1] 'If the shire be the ancient under-kingdom, or the district whose administrative system is created in imitation of that of the under-kingdom, the shire-moot is the folkmoot in a double sense, not merely the popular court of the district, but the chief council of the ancient nation who possessed that district in independence, the witenagemot of the pre-heptarchic kingdom. Such a theory would imply the much greater preponderance of popular liberties in the earlier system, for the shiremoot is a representative assembly, which the historical witenagemot is not; and this is indeed natural, for the smaller the size of the districts and the more nearly equal the condition of the landowners or sharers in the common land, the more easy it would be to assemble the nation, and so much the less danger of the supreme authority falling into the hands of the king and the magistrates without reference to the national voice. But this can only be matter of conjecture.'—Stubbs, Const. Hist. i. 116.

were reserved for the King's immediate cognisance. But the shiremoot could not be resorted to until justice had first been sought and denied in the court of the hundred; and on the same principle no appeals could be carried to the King, unless the shiremoot had previously failed to do justice. The court of the shire, though it gradually lost much of its importance after the Norman Conquest, especially after the institution of the justices itinerant, long continued to exercise an extensive civil jurisdiction in small causes, and remained the general assembly of all the freeholders of the shire for county purposes.[1] As an instrument in limiting the power of the feudal aristocracy, it 'contributed in no small degree to fix the liberties of England upon a broad and popular basis.'[2]

Procedure.

Nearly all the work of judicature consisted in the declaration of the law applicable to each case, as distinguished from the finding of the facts. The *law* was declared by the presiding magistrates—the ealdorman, or sheriff, and the bishop,—and the select body of assessors. The *facts* (except in a certain class of civil causes to be presently noticed) were decided either by compurgation or by ordeal.

Facts, how decided.

Compurgation.

1. The accused might clear himself by his own oath strengthened by the oaths of certain compurgators, usually twelve in number, and either his relatives or immediate neighbours, who testified to the trustworthiness of the person on whose behalf they came forward. The compurgators were in reality 'witnesses to character.'[3] But the oaths of different men varied in legal value and credit according to the rank and property of the swearer. The

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[1] [This general participation of the Freeholders in the County Court of post-Norman times down to *t.* Hen. III. has of late been denied by Mr. F. W. Maitland and Mr. J. H. Round, in *Eng. Hist. Rev.* 1889, but, as far as the present Editor can judge, on grounds which are still mainly conjectural. See *post*, ch. vii.—ED.]

[2] Hallam, Midd. Ages, ii. [277].

[3] The system of Compurgation was common to all the Teutonic nations, but the number of compurgators required varied in the different nations.

oath of one ealdorman counterbalanced that of six thegns; the oath of one thegn that of twelve ceorls. If the accused were subject to a hlaford, the lord or his gerefa might offer to swear on behalf of the vassal. But if the testimony of the lord were not in his favour, the accused vassal was bound either to produce a triple number of compurgators or to undergo an ordeal of threefold rigour. Not only the accused, but the accuser also, was bound to take an oath (*for-ath*) that he was not actuated by interested or vindictive motives.

Ordeal.

2. But compurgation was not always allowed. In certain cases, as when a man was taken red-handed, or bearing other proofs of guilt, he was obliged to submit to the ordeal. The ordeal was also compulsory—(1) where the accused was unable to produce a sufficient number of compurgators; (2) where he had been notoriously guilty of perjury on a previous occasion; (3) where he was not a freeman—unless his hlaford swore to his belief in the innocence of the accused, or bought him off by paying the wergild.

The *ordeal*, or judgment of God, was of three kinds—hot iron, hot or cold water, and the corsnaed, or accursed morsel. It was to be undergone (except as to the cold water ordeal) in a church, and under the superintendence of the priests. It is very difficult for us to understand how even the most innocent could have escaped condemnation under this process, except by the collusion of the officials; but there is no doubt that in its origin the ordeal was intended as a reverent appeal to God, in the firm belief that He would make the truth manifest.

Legally appointed witnesses to bargains.

3. Besides the compurgators, or witnesses to character, there was also, in civil causes, a special class of witnesses appointed by law for the attestation of facts—bargains and sales. In some respects they are analogous to the public notaries of the present day. They are first mentioned in a law of King Athelstan (A.D. 924–940), which enacted that there should 'be named in every reeve's "manung" (district) as many men as are known to be unlying, that they

may be for witness in every suit.'[1] But the most explicit information about these legal witnesses is contained in the Laws of Edgar (959–975): 'This, then, is what I will: that every man be under "borh" both within the "burhs" and without the "burhs;" and let witness be appointed to every "burh" and to every hundred. To every "burh" let there be chosen xxxiii as witness. To small "burhs" and in every hundred xii, unless ye desire more. And let every man, with their witness, buy and sell every of the chattels that he may buy or sell, either in a "burh" or in a wapontake; and let every of them, when he is first chosen as witness, give the oath that he never, neither for money, nor for love, nor for fear, will deny any of those things of which he was witness, nor declare any other thing in witness save that alone which he saw or heard; and of such sworn men let there be at every bargain two or three as witness.'[2] The sworn testimony of these legally appointed witnesses was decisive of any dispute which might subsequently arise.[3]

Punishments.

Wergild.

The principle that every injury either to person or property might be compensated by a money payment was common to all the northern nations. It was introduced into Gaul by the conquering Franks,[4] and into Britain by the English invaders. Every man's life had a fixed money value, called the *wergild*. In the case of a freeman, this compensation for murder was payable to his kindred; in that of a slave, to his master. The amount of the wergild varied, according to a graduated scale, with the rank of the person slain. For a ceorl it was fixed at 200 shillings; for a lesser thegn, 600 shillings; for a king's thegn, 1200 shil-

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[1] Conc. Exon. cap. i. (Thorpe, Anc. Laws and Inst.) [Sel. Chart. 65.]

[2] Edgar, Secular Ordnance, Suppl. cap. 3, 4, 5, 6. [*Id.* 71. '*borh*'=surety, '*burh*'=town.]

[3] For the ancient English judicial system, see Forsyth, Trial by Jury, pp. 54—92.

[4] [M. Esmein, *Rev. Gén. du Droit*, 1885, p. 302, *seqq.* cites letters of Sidonius Apollinaris, proving a Gallo-Roman *compositio* in criminal causes, and argues that customs strikingly similar to those of the invaders were previously established in Gaul.—ED.]

lings.[1] The *wer* of an ealdorman was double that of a king's thegn; that of an atheling three times, that of a king usually six times as much. For bodily injuries a *bôt* was payable, being highest in amount where any disfigurement ensued.[2] In every case the King was entitled to a *wite*, or fine, for the breach of his peace. In the course of time capital punishments were introduced for offences against the State, or the King as its representative. Alfred declared that treason against a lord he dared not pardon; and fighting in the king's hall, coining, and several other state offences were made 'death-worthy.' At a later period the severity of the laws increased, especially as to theft, which was sometimes capitally punished. But neither severity nor lenity seems to have availed to restrain the general turbulence of the people. The laws are filled with complaints of the open violations of the public peace. The relatives of a murdered man freely maintained the right to vengeance, and 'open morth,' as the private feud was termed, frequently went on for a long period between the two families. The law of money compensation must be regarded therefore as showing rather what society was intended to be, than what in very many instances it actually was. For certain offences, the punishment of exile was inflicted; and the man who fled from trial became an outlaw, whom any one might slay as he would a wild beast.

Bôt. *Wite.* Death.

The laws of the English, the most ancient of modern laws,[3] extend in an unbroken series from the laws of Ethelbert, the first Christian king of Kent (600), down to the present time. The earliest written collections are

Ancient English laws. (600—1066.)

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[1] From the amount of his *wer* a thegn was sometimes called a *twelf-hynde man* (hynde, hund, here=a hundred), a lesser thegn a *six-hynde man*, and a ceorl a *twy-hynde man*.

[2] The *bot* for the smallest disfigurement of the face was three shillings, the same as for breaking a rib.

[3] [In the scheme of European law here suggested, the Brehon law would clearly belong to the Archaic system, and such would seem to be the true view, from the researches of Sir Henry Sumner Maine, M. d'Arbois de Jubainville, and others. For the laws of Ethelbert, cf. Haddan and Stubbs, *Councils and Ecclesiastical Documents*. Oxford, 1869—78, vol. iii., pp. 42—50.—Ed.]

simply digests of local unwritten customs which had been handed down by oral tradition, and which were now put into writing to meet the requirements of a more developed and centralised state organisation. Many of these early laws consist of amendments of older unwritten customs, and from our lack of knowledge of the customs intended to be amended, are necessarily somewhat obscure. Even when the laws are clear, the great bulk of them 'concern chiefly such questions as the practice of compurgation, ordeal, wergild, sanctity of holy places, persons, or things; the immunity of estates belonging to churches, and the tables of penalties for crimes, in their several aspects as offences against the law, the family, and the individual.'[1] But scattered through the collection there occur from time to time many enactments of the highest interest and importance as elucidations of the early history of the Constitution.[2]

Early attempts at Codification in England.

Some of these laws, *e.g.*, those of Alfred (890), of Ethelred (978–1016), of Cnut (1016–1035), and those ascribed to Edward the Confessor (1043–1066), exhibit traces of early attempts at codification. But the name Code cannot with propriety be applied to them. They are unsystematic and fragmentary, and such general principles as they enunciate are not legal definitions, but maxims drawn from religion or morality.

Alfred as a legislator.

Of all our early kings, Alfred the Great has enjoyed the widest fame as a legislator. Popular legend has represented him as the personal author of nearly all our institutions, of many of which the germs existed ages before, while the existing forms cannot be discerned till ages after him. There is no doubt that, like many others of our early kings, Alfred collected and arranged the laws of his predecessors; but his real position, as a compiler of old rather than an originator of new legislation, is accurately set forth

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[1] Stubbs, Sel. Chart. 60.

[2] These passages are collected by Bishop Stubbs in his Select Charters, pp. 60—75.

by himself in the preamble to his 'Dooms;' 'I then, Ælfred, King, these [laws] together gathered, and had many of them written which our fore-gangers held, those that me-liked. And many of them that me not liked, I threw aside, with my Wise Men's thought, and no other wise bade to hold them. For why, I durst not risk of my own much in writ to set, for why, it to me unknown was what of them would like those that after us were. But that which I met, either in Ine's days my kinsman, or in Offa's the king of the Mercians, or in Æthelberht's that erst of English kin baptism underwent, those that to me rightest seemed, those have I herein gathered, and the others passed by. I then, Ælfred, King of the West Saxons, to all my Wise Men these showed, and they then quoth that to them it seemed good all to hold.'[1]

The general features of the institutions and laws of the English people during the five hundred years preceding the Norman Conquest have now been briefly surveyed. In different districts and at different periods a great diversity of local customs prevailed; but amidst many varieties of detail the essential principles and general machinery of government possessed, throughout, the characteristics which have been described. It must not, however, be supposed that during this lengthened period the institutions of the English were at any time stationary. They were subject to a marked though gradual process of development, the general tendency of which may be described as a movement from the Personal organisation characteristic of all ancient systems of government towards the Territorial organisation which forms the basis of the modern State. At the beginning of the period, the Anglo-Saxon Kings were the leaders of the people, not the lords of the soil, their jurisdiction was primarily over the persons of their subjects, not over the territories included within the

Diversities of local custom.

Gradual process of development:

from Personal to Territorial organisation.

[1] Alfred's Dooms. Thorpe's Anc. Laws and Institutes, i. 58, 59; Freeman, Norm. Conq. i. 53.

geographical boundaries of their kingdom.[1] Towards the close of the pre-Norman period, the King, though still 'King of the English' had become, in addition, lord of the English land. Nearly two centuries were indeed to elapse before King John should declare himself, on his great seal, *Rex Angliae* instead of *Rex Anglorum*, but the transition from the Tribal to the Territorial system, from the kingship of the people to the conception of the King as feudal lord of both kingdom and people, was already far advanced towards completion.[2]

Increase in power of the great nobles.

But whilst, in theory, the power of the King was rising higher and higher, it was practically limited by the simultaneous advance in the power of the great nobles, who were constantly tending towards a position not far removed from that of the great feudatories of the Continent. Under Edward the Martyr the condition of England was not unlike that of France under Charles the Bald. The great Earls, or ealdormen of provinces, were forming a separate order in the State inimical alike to the supremacy of the King and the liberty of their fellow subjects. Cnut divided the kingdom into four great Earldoms or Duchies; and the same policy was continued by Edward the Confessor, in whose reign the whole land seems to have been divided among five Earls, three of them being Earl Godwin and his sons Harold and Tostig. The power and statesmanship of William the Norman prevented the threatened disintegration of the kingdom.

The great Earldoms under Cnut and Edward the Confessor.

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[1] Palgrave, Eng. Commonwealth, pt. i. p. 62.

[2] Stubbs (Const. Hist., i. 166, 168).

[For recent views on the growth of Feudalism in France, cf. Flach, *Les Origines de la France Ancienne*, Paris. Larose et Forcel. The expression 'Duchies' in the text is perhaps somewhat misleading. The epithet *Dux* is no doubt found in A.-S. Charters, and it is urged by Mr. W. A. Lindsay, M.A., in *Genealogist*, N. S., i. and ii., 1884–5, *s.v.* 'Dukes, Earls, and Maormars,' that there is internal evidence of a distinction between the *Dux* and the Ealdorman, and that the *Dux* was the superior. The greater Earls were probably willing to be adorned with high-sounding titles, but evidence of a permanent substantive rank in the A.-S. hierarchy superior to that of Ealdorman or Eorl, *i.e.*, Earl, appears still to be wanting. In Celtic Scotland there certainly does not seem to have existed any rank between the Earl and the King.—ED.]

CHAPTER II.

THE NORMAN CONQUEST.

On the death of Edward the Confessor (5th of January, 1066), the succession to the crown was disputed. The heir of the house of Cerdic, Edgar the Atheling, grand-nephew of the late King, was not only of tender age, but, as his after-life showed, of feeble character and mediocre intellect. The political exigencies of the kingdom imperatively demanded an able and resolute man at its head. King Edward on his death-bed had recommended as his successor his brother-in-law, Earl Harold. The Earl was the most able general and statesman of the time, already exercising a quasi-Royal authority through his own personal influence and the vast possessions of the Godwin family, and, though lacking the blood of Cerdic in his veins, was allied to the English royal house by affinity, and by blood to the Danish house which had so lately occupied the throne.[1] The Witan, who were at this time assembled in their ordinary mid-winter session, approving of Edward's recommendation, elected Earl Harold King of the English, and he was forthwith anointed and crowned by Aldred, Archbishop of York.[2]

Disputed succession to the Crown.

Earl Harold:

elected and crowned King.

But there was another competitor for the crown in the person of William, Duke of Normandy, who was cousin to

William, Duke of Normandy.

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[1] Harold's mother, Gytha, was a sister of Ulf Jarl and first cousin once removed of King Cnut.—Thorpe's Lappenberg, Ang. Sax. pp. 280, 370. [The exact relationships of Gytha have been matter of dispute among genealogists.—Ed.]

[2] Flor. Wigorn. an. 1066. 'Quo [Eadwardo] tumulato, Subregulus Heraldus, Godwini Ducis filius, quem Rex ante suam decessionem regni successorem elegerat, a totius Angliae primatibus ad regale culmen electus, die eodem ab Aldredo Eboracensi Archiepiscopo in Regem est honorificè consecratus.'

Edward the Confessor through that king's mother, Emma of Normandy, and now claimed the throne under an alleged earlier appointment of his late kinsman. If such appointment or promise had indeed been made, which seems probable,[1] it was superseded by the last expression of King Edward's wishes. Under any circumstance it could merely amount to a recommendation to the Witan. A King of the English had never possessed a Constitutional right to bequeath his kingdom like a private estate. The right of electing a King resided in the Witan alone, acting on behalf of the whole nation. Their choice, it is true, had hitherto, when freely exercised, been restricted to the members of the Royal house; but failing an eligible descendant of Cerdic, the choice of the nation was unlimited.

The kingship elective.

The Conquest.

William, however, professed to be merely asserting his legal right. Having secured the moral and religious support of the Papal benediction, which the Roman See, in its anxiety to reduce the independence of the National English Church, was most ready to bestow, and leading a large army of Normans and other foreigners, all inured to warfare and eager for booty, William landed in England to decide by the fate of arms between himself and the 'usurper' Harold. At the decisive battle of Senlac the Normans were victorious, Harold, his brothers, and the flower of the English thegnhood being left dead on the field. Although, on the news of Harold's death, the Londoners at once chose Edgar Atheling for king, disunion and the lack of effective organisation prevented any successful resistance to the onward march of the invaders. William had as yet conquered but a very small portion of the kingdom, but such was the panic of the nation, that he was elected king by the Witan, and crowned at Westminster on Christmas Day, 1066, by the same Archbishop Aldred who had crowned the unfortunate Harold.[2] In conformity

14 Oct. 1066.

William elected and crowned King of the English.

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[1] See Freeman, Norm. Conq. ii. 296—304.

[2] Will. Pictav., Gesta Willelmi (ed. Maseres), p. 145; Flor. Wigorn. ann. 1066.

with his original pretensions, he assumed the title of 'King of the English,' and entered into the usual compact with the nation in the ancient Coronation oath.

Theoretically a Constitutional king.

William evidently began with the intention of reigning as the appointed heir of Edward and the lawful successor of the English kings. In that character he was obliged to respect the laws and customs of the Kingdom. Theoretically he continued to govern as a Constitutional king, though practically in defiance of everything but his own wishes.

Continuity of the Constitution.

The continuity of the English Constitution was not broken by the Norman Conquest. That event ought to be regarded not as a fresh starting-point, but as 'the great turning-point' in the history of the English nation. 'The laws, with a few changes in detail, remained the same; the language of public documents remained the same.' The powers of King and Witan remained constitutionally the same under William as under Edgar.[1]

The Norman race.

The infusion of Norman blood has been considered extensive enough to count as one of the four chief elements of the present English nation; but it was still only an infusion.[2] In the course of little more than a century it became absorbed, as the smaller Celtic and larger Danish elements had been absorbed previously, in the predominant English nationality. The fusion was doubtless facilitated by the common Teutonic descent of the two peoples.[3] The Normans were in fact Northmen, who, instead of coming direct from Scandinavia, had sojourned for a century and a half in a French home. While retaining much of the Norse character, they had acquired, during the interval, the language and civilisation of the Romanised Gauls and Franks, developing in the process a brilliant nationality distinct alike from the nationality of their origin and of

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[1] See Freeman, Norm. Conq. i. 72.

[2] [The writer of an interesting though somewhat fanciful work, *The Norman People*, 1874, has offered an elaborate argument in favour of the great extent of the Norman element. But though his researches are full of curious information, the deductions of the author are far from carrying conviction in many cases upon which he relies, and are not generally accepted.—ED.]

[3] *Supra*, p. 3.

their new home. The conquerors, moreover, were by no means utter strangers to the people whom they subdued. The vicinity of so remarkable a nation as the Normans had early begun to produce an influence upon the public mind of England, and had to some extent prepared the way for their ultimate supremacy. 'Before the Conquest, English princes received their education in Normandy. English sees and English estates were bestowed on Normans. The French of Normandy was familiarly spoken in the palace of Westminster. The court of Rouen seems to have been to the court of Edward the Confessor what the court of Versailles long afterwards was to the court of Charles the Second.'[1]

Effects of the Conquest.

The immediate changes which the Conquest introduced were undoubtedly great, but they were practical rather than formal. The power of the Crown was vastly increased. As the government became more centralised, local self-government, the essential characteristic of our Teutonic constitution, was for a time depressed; but only to arise again later on, when the nobles and people became united against the tyranny of the Crown. The social aspect of England was enormously changed. The old dynasty had been supplanted by an alien family. The old aristocracy was superseded by a new nobility.[2] The old offices received new names—the ealdorman, or earl, became the *comes*, the sheriff the *vice-comes;* and with the new names and alien officials, the old laws, though retained, and even

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[1] Macaulay, Hist. Eng. i. 12 [ed. 1861].

[2] [The Norman nobility in England can, in the main, of course, only be spoken of as 'new' with regard to its English settlement. Those who were already the nobles of the Norman Duchy were necessarily also the nobles of the English Kingdom, when the Norman Duke had become King of the English. M. Glasson, in his *Droit et Inst. Pol. de l'Angleterre* (Paris. Pedone-Lauriel. 1882—3), ii. p. 164, speaks, perhaps rhetorically, as though every follower of William became *ipso facto* noble in England (Tous les conquérants, même de la plus basse extraction, devinrent nobles). There seems to be no more reason to believe this than to believe that they were all noble in Normandy, or in the various other lands from which the 'aventuriers' and 'enfants perdus de l'Europe Occidentale' of M. Glasson's text flocked to William's standard.—ED.]

promulgated anew, must have been considerably modified in practical administration.[1]

Feudalism.

The most important result of the Conquest, in its Constitutional aspect, was the assimilation of all the institutions of the country, from the highest to the lowest, to the Feudal type. This was a consequence of the immense confiscations of landed estates, which, occurring not all at once, but from time to time, ultimately placed King William in the position of supreme landowner, and established the Feudal System in England.

Its gradual establishment.

The steps by which this great change was brought about, and the nature of the system of tenure thus established, demand some consideration.

At first the Conqueror,[2] with an appearance of strict legality, appropriated merely the extensive Royal domains—the *folkland*, now finally changed into *terra regis*—and the large forfeited estates of the Godwin family and of all those who had, or were suspected of having, taken up arms against him. Reserving to himself as the demesne of the Crown more than 1400 large manors scattered over various counties, he divided the rest among his companions in arms. Although William affected to regard all Englishmen as more or less tainted with treason and liable to forfeiture of their estates, inasmuch as they had either fought against him or failed to range themselves on his side, yet the bulk of the landowners were at first suffered to retain their possessions. But there is reason to believe that this was subject to the condition of accepting a re-grant from the Conqueror; the more important personages, in

The English redeem their lands.

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[1] Freeman, Norm. Conq. i. 4. [Cf. Glasson, *op. cit.* ii. p. 21. Quant aux Saxons, s'ils ont été vaincus, cependant ils ne sont pas une nation démembrée, disloquée, déracinée, inerte, comme les populations du continent qui, au sortir de la longue domination Romaine, ont été livrées à l'invasion desordonnée des Barbares ; les Saxons font masse, restent attachés à leur sol.—Ed.]

[2] It is perhaps scarcely necessary to remark that the term 'Conqueror' did not in the language of the time of which we are treating imply subjugation, but signified merely one who 'had sought and obtained his right.' In reality, however, the modern meaning of the term more accurately describes William's practical position, which was, as he himself once expressed it, 'King by the edge of the sword.'

return for their adhesion, receiving back their estates as a free gift, the smaller owners on payment of a money consideration.[1] By this means William procured a peaceable acknowledgment of his title over extensive districts into which his arms had not yet penetrated.

Insurrections, followed by extensive confiscation.

During the Conqueror's first absence from England a reaction set in after the panic; and the oppression and insolence of the Normans, Odo of Bayeux and William FitzOsbern, who had been left in charge of the kingdom as justices regent, excited the natives to rebel. One rising was no sooner suppressed than others broke out in different parts of the kingdom, and the first four years of his reign were occupied by William in acquiring the actual sovereignty of his new dominions. Each insurrection, as it occurred, was followed by a confiscation of the estates of those who in the eye of the law were rebels, however patriotic and morally justifiable may have been the motives by which they were actuated. Thus, by a gradual process and with an outward show of legality,[2] nearly all the lands of the kingdom came into the hands of the King, and were by him granted out to his Norman nobles, to be held by the Feudal tenure, to which they were alone accustomed in their own country. The maxim of later times, 'Tout fuit en lui et vient de lui al commencement,'[3] seems

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[1] The contemporary Peterborough chronicler speaks of all who did homage to William at or soon after his coronation, as buying their land; 'And menn guldon him gyld and gislas sealdon, and *syððan heora land bohtan*' (A.-Sax. Chron. 1066). [All were obliged to seek the King, and to buy their lands, says Morgan, *Eng. under Norm.* p. 3, citing, 'Hanc terram habet Abbas in vadimonio pro xi marcis auri, concessu Engelrici *quando redimebant Anglici terras suas*,' Domesday, ii. 360; Cf. Freeman, *Norm. Conq.* iv. 25.—ED.] The Inquisitio Eliensis also confirms this view: 'Hoc totum tripliciter; scilicet tempore Regis Eaduardi, et quando Rex Willelmus *dedit;* et quomodo sit modo.' [This passage is on f. 38a of Tiberius A. VI., from which MS., in the Cotton Collection, British Musuem, the text of the Inq. Eliensis has been printed by Mr. N. E. S. A. Hamilton, in his valuable *Inquisitio Comitatus Cantabrigiensis*, edited for the Royal Society of Literature, London, 1876, and will be found on p. 97 of that edition.—ED.]

[2] Nulli Gallo datum quod Anglo cuiquam injuste fuerit ablatum.—Orderic. Vital. [This statement by Orderic is the more interesting from the fact that, as Freeman, *Reign of William Rufus*, i. 271, says, he never forgot his birth on the banks of the Severn. But it must not be presumed to mean more than *outward* legality.—ED.]

[3] Year Book, 24 Edw. III. 65.

to have been something more than a fiction. At the time of the Domesday survey there still remained some few exceptions to the general feudal tenure, but before the accession of Henry I. all tenures seem to have become uniformly feudal.[1]

Continental Feudalism.

At the period of the Norman Conquest, Feudalism in both tenure and government was fully established in France, the country of its historic development, and in most of the continental countries of Europe.[2] It had grown up gradually, deriving its elements partly from a Roman, partly from a Teutonic source. Indirectly and in part, it may be traced to the Roman system of usufructuary ownership and to the practice, under the Empire, of granting out frontier lands to the *limitanei milites*, to be held by military service; but its direct and principal sources were (1) the system of beneficiary grants which grew up under the Frank Kings and Emperors, working in combination with (2) the practice of personal commendation or vassalage, which seems to have superseded and absorbed the primitive and, in many respects, analogous German [and Celtic][3] *comitatus*.

The machinery of government feudalised.

On the Continent, Feudalism had become much more than a mere system of tenure. It was inseparably bound up with the system of government and the legal and social relations of the people. To the possession of a fief was united the right of local judicature. Originally tenable for life only, fiefs soon came to be hereditary. The practice of 'sub-infeudation' naturally followed. The great feudatory who had received large grants of land

Sub-infeudation.

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[1] Stubbs, Select Chart., Introductory Sketch, 14.

[2] [For recent views on the history of Feudalism in France, see *Les Origines de la France*, by J. Flach. Paris. Larose et Forcel, vol. i., and cf. also, for special subjects, Garsonnet, *Hist. des Locations Perpétuelles*, Lefort, *Hist. des Contrats de Location Perpétuelle*, and Arts. by Garsonnet, in *Nouv. Rev. Hist. de Droit*. Paris. Larose, and by Lefort in *Rev. Gén. du Droit*, Paris. Thorin, and other works and arts. cited in list of authors in present edition.—ED.]

[3] [That there was a Celtic *comitatus* is clearly proved by M. Joseph Lefort, in his interesting essay, *Le Droit et les Institutions des Gaulois*, already cited.—ED.]

from his Sovereign, retained a certain portion for his own demesne and then parcelled out the remainder amongst his own dependents, to be held by services similar to those which he himself owed. The provincial governors, who held the largest beneficiary estates, and in many cases were also extensive alodial proprietors, found themselves strong enough to establish a number of provincial principalities—*imperia in imperio;* in which, while admitting a nominal dependence on the Sovereign, they claimed and exercised a practically independent military and civil jurisdiction. It was of the essence of a fief that its tenant owed fealty to his immediate lord and not to the State or the Sovereign.[1] The King might be the immediate lord; but in this case obedience was due to him, not in his political capacity as sovereign, but in his feudal capacity as lord. Thus during the height of the Feudal System in France, the tenants of the immediate vassals of the Crown never hesitated to follow their lord's standard against the King.[2]

Commendation.

The general conversion of Alodial into Feudal tenure was also due, in a great degree, to the voluntary action of the smaller free proprietors, who, in an age of lawlessness and rapine, were glad to submit their persons and estates, by way of *commendation*, to some powerful neighbouring lord.[3]

Feudal tenure of Church lands.

Not only the possessions of laymen, but those of the Church, became subject to the all-pervading feudal influence: the Bishops and Abbots, equally with the feudal nobles amidst whom they lived, swearing fealty for their lands to the

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[1] Hallam, Middle Ages, i. [185].

[2] So late as the reign of St. Louis (1226—1270) it is laid down in his Establishments, that a vassal to whom the King had refused justice might summon his own tenants, under penalty of forfeiting their fiefs, to assist him in obtaining redress by arms.—Etab. de St. Louis, c. 49; Hallam, M. A. i. [167].

[3] See Guizot, Essais sur l'Hist. de France, 166, and Hallam, M. A. i. [316—320]. The practice of Commendation had originally no connection with land, but created a merely personal tie of mutual protection and fidelity, similar to the Roman *clientela*. [On Commendation, cf. Garsonnet, *La Recommandation*, &c., in *Nouv. Rev. Hist. de Dr.* for 1878, and Lefort, *Le Patrocinium*, in *Rev. Gén. du Dr.* for 1889.—ED.]

King or other superior, and exercising feudal jurisdiction and authority over their own vassals.[1]

Growth of Feudalism in England.

In England an indigenous growth of feudalism had been going on, but its development had been slower and more purely Teutonic than on the Continent, where the legal principles and practices of imperial Rome exercised an accelerating influence. As a *system*, Feudalism cannot be said to have been established in England prior to the Conquest, but all its elements had long existed, both separately and sometimes in combination. The two chief elements of Feudalism are: (1.) The personal relation of lord and vassal founded on contract, and binding the parties to mutual fidelity, the one owing protection, the other service. (2.) The holding of the usufruct (*dominium utile*) of land on the condition of rendering military service, the ultimate property (*dominium directum*) remaining in the lord, the grantor. Combined, these two elements constitute Feudalism; apart, neither is sufficient. In the personal relation which existed between the Teutonic *princeps* and his *comites*, between the English Hlaford and Thegn, we have the first element of feudalism in its integrity. We have seen how universal the practice of commendation became, in so much that the lordless man was soon looked upon as an anomaly in the State and treated as an outlaw.[2] One of the most natural modes in which the Hlaford would reward his followers would be by a grant of land, subject to the condition of service, military service more especially. By the beginning of the 11th century the King seems to have assumed the right of disposing of the folkland without the consent of the Witan, and of granting it out to his followers as a reward for past, a retainer for future services. Moreover, by means of sub-infeudation and commendation,[3] a very large part of the

[Its two chief elements: 1. Contract of mutual fidelity; 2. Tenure by military service.]

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[1] Hallam, Middle Ages, i. [194].

[2] *Supra*, p. 27.

[3] The practice of commending a man's person and lands, in order to obtain protection against violent aggression, appears to have been common in England as well as on the Continent. [Digby, *Hist. Law of Real Property*, 3rd ed.,

land of England had come to be held by a feudal tenure, in contradistinction from alodial ownership, which remained the privilege of the few.[1] But up to this stage feudality had affected only the tenure of land. The policy initiated by Cnut and continued under Edward the Confessor, of dividing the country among a few great Earls, who in some cases succeeded in transmitting their jurisdictions to their children, carried the feudal tendency a step further; and but for the Norman Conquest would probably have resulted in the development of a feudalism almost identical with that which existed on the Continent.

Difference between English and Continental feudalism.

Both in the kingdom of France and in his own duchy of Normandy, William had been familiar with the evils of

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p. 26, notes that *liberi homines commendati* is a very common expression in Domesday, and as to land, shows that *alodium* was changing its meaning at this date. Thus, *ipse tenuit in alodio de rege Edwardo*, is also a common entry in Domesday, proving that though the name of allodial ownership remained, its essence was gone, and the history of land-holding in England had entered upon a new phase, which Mr. Digby justly describes (*loc. cit.*) as a transitional period between absolute independence and feudal tenancy. This change was, of course, partly due to the need of protection, as in Domesday, p. 326, and p. 58, where a man and two women commended themselves, *pro defensione*, to the Abbey of Chertsey, and Tori, T. R. W., commended himself to Bishop Osmund, as his father had done, T. R. E., to Bishop Herman, *pro defensione.* But it was also part of a general change, gradually tending to the complete Feudalisation of Western Europe. In Eastern Europe, the Feudal system was never anything else than an exotic introduced by the Latin invaders of the Eastern Roman Empire.—ED.]

[1] 'The dependent,' remarks Bishop Stubbs, 'might be connected with the king (1) by service, (2) by comitatus, (3) by commendation, (4) by reception of land as a benefice. Frank feudalism grew out of the two latter, the English nobility of service from the two first. . . . The feudalism that followed the Conquest was Frank and territorial, that which preceded it grew from personal and legal, not from territorial influences. On the growth of Frank feudalism, see Waitz, Deutsche Verfassungs-Geschichte, ii. 262; iv. 210. . . . In the Frank empire the beneficiary system is unconnected with the comitatus, in the English they are in the closest connection.'—Const. Hist. i. 153, n. [Concerning the nature and history of the beneficiary system, there is still some controversy. M. Garsonnet, in the *Nouv. Rev. Hist. de Droit*, Paris, 1878 (*La Recommandation et les Bénéfices à l'Epoque Franque*), entirely repudiates the ordinary view. His language is so strong as to deserve citation: 'Les bénéfices n'ont donc été, en droit, ni révocables, ni temporaires, mais il y en a eu, à tout temps, d'héréditaires et de viagers' (*op. cit.*, p. 474). He admits the frequency of life *Beneficia*, but asserts that their perpetuity was recognised under the Franks in Gaul, as early as the Treaty of Andelot, in the 6th century, and in Brittany from the 9th century. That the two forms existed side by side during a portion of the Beneficiary period is no doubt true; and it may be that we ought to carry that portion further back than the ordinary accounts take it. But M. Garsonnet's position seems too extreme.—ED.]

Feudalism as there established. His recollection of contests with his own barons was too keen and too recent not to induce him to prevent, if possible, a recurrence of the struggle in his newly-acquired kingdom. From the very first he took measures to check the natural development of feudalism in England; and although by gradually substituting the Frankish system of land tenure for the complicated system which had grown up in England, he may be said to have established the Feudal System, it was as a system of tenure only, not of government organisation. He was determined to reign as the King of the nation, not merely as feudal lord. While, therefore, availing himself of all the advantages of the Feudal System, he broke into its 'most essential attribute, the exclusive dependence of a vassal upon his lord,'[1] by requiring, in accordance with the old English practice,[2] that all landowners, mesne tenants as well as tenants-in-chief, should take the oath of fealty to the King. This was formally decreed[3] at the celebrated Gemot held on Salisbury Plain, on the 1st of August, 1086, at which the Witan and all the landowners of substance in England, whose vassals soever they were, attended, to the number, it is reported, of 60,000. The statute, as soon as passed, was carried into immediate effect, and all the landowners (*landsittende men*) became 'this man's men,' and 'swore him oaths of allegiance that they would against all other men be faithful to him.'[4]

Feudal tenure of land without feudal principles of government

Gemot of Salisbury, A.D. 1086.

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[1] Hallam, Midd. Ages, ii. 315.

[2] The oath is mentioned in the laws of King Edmund (*circ.* A.D. 943): *De Sacramento Fidelitatis Regi Edmundo faciendo.* In primis ut *omnes* jurent in nomine Domini, pro quo sanctum illud sanctum est, fidelitatem Edmundo regi, sicut homo debet esse fidelis domino suo, sine omni controversia et seditione, in manifesto, in occulto, in amando quod amabit, nolendo quod nolet; et antequam juramentum hoc dabitur, ut nemo concelet hoc in fratre vel proximo suo plus quam in extraneo.—Thorpe, Anc. Laws and Inst.; Select Chart. 36.

[3] Statuimus etiam ut omnis liber homo foedere et sacramento affirmet, quod infra et extra Angliam Willelmo regi fideles esse volunt, terras et honorem illius omni fidelitate cum eo servare et ante eum contra inimicos defendere.—Stat. Will. Conq. *Id.* p. 80.

[4] Ang.-Sax. Chron. *s.a.* 1086. [It may be questioned whether, in exacting this general homage, which has been so strongly brought forward as an innovation, William was really doing more than he had been entitled and

Domesday Survey.

This national act of homage and allegiance to the King, which, far from marking the formal acceptance of Feudalism, as some have contended, was, in reality, anti-feudal, followed immediately upon the compilation of the Domesday Survey, which had been decreed in the memorable midwinter Gemot of Gloucester, 1085—1086. The recently attempted invasion from Denmark seems to have impressed the King with the desirability of an accurate knowledge of his resources, military and fiscal, both of which were based upon the land. The survey was completed in the remarkably short space of a single year. In each shire the commissioners made their inquiries by the oaths of the sheriffs, the barons and their Norman retainers, the parish priests, the reeves and six ceorls of each township. The result of their labours was a minute description of all the lands of the kingdom, with the exception of the four northern counties of Northumberland, Cumberland, Westmoreland, and Durham, and part of what is now Lancashire. It enumerates the tenants-in-chief, under-tenants, freeholders, villeins, and serfs, describes the nature and obligations of the tenures, the value in the time of King Edward, at the Conquest, and at the date of the survey, and, which gives the key to the whole inquiry, informs the King whether any advance in the valuation could be made.[1]

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accustomed to do as Duke of Normandy. Cf. *Coustumier du Pays et Duche de Normandie* (Rouen and Paris, 1539), c. xiiij., fol. xxiij.; and *Nouvelle Revue Historique de Droit Français et Etranger* (Paris. Larose et Forcel), 1883, p. 662, Art. by M. Beaudoin.—ED.]

[1] The returns were transmitted to Winchester, digested, and recorded in two volumes which have descended to posterity under the name of Domesday Book. The name itself is probably derived from Domus Dei, the appellation of a chapel or vault of the Cathedral at Winchester in which the survey was at first deposited. From this authentic record our most certain information is obtained as to the Old English common law, as it appears in the local customs referred to; the character of the municipal government and 'consuetudines' of the towns; the financial system of the shires whilst still under the administration of the earls; and the general political and social condition of England towards the end of William's reign. [The origin and meaning of the name, Domesday or Domesday Book, cannot yet be said to be free from doubt. Stow gives the 'Domus dei' explanation, while the author of the Dialogus de Scaccario propounds the 'Dies Judicii' theory. It is certain, however, that the name was applied to several similar records, as we have notices of the Domesday of St. Paul's, or of Ralph de Diceto, the Domesday of Chester, the Domesday of

In addition to his exaction of homage from the sub-tenants, William took other effective measures to keep the great feudatories in check. The lordships which he bestowed upon his principal barons were scattered over the kingdom, so that in no one district should the territories of one man be great enough to tempt him to rebellion.[1] An unforeseen but very important result of this arrangement was the necessity under which the nobles found themselves of combining with one another, and ultimately of seeking the help of the people, in order to resist the Royal power. 'Thus the Old-English parliamentary instincts which the Conquest for a while checked were again awakened and strengthened.'[2] William abolished the great Earldoms which had threatened the integrity of the Kingdom under Edward, and, reverting to the earlier English practice, restricted the jurisdiction of the Earl to a single shire. The government of the shire—judicial, military and finan-

Checks to the power of the feudatories.

Great Earldoms abolished.

York, &c. In a Paper on *The Study of Domesday Book*, printed in *Domesday Studies*, vol. i., Mr. Stuart Moore, F.S.A., discusses the name, without apparently throwing any new light upon it. But he states (*Ibid.*, p. 4) that 'wherever the monk transcribing the Record has done so correctly, and appears to have in any way studied his subject, he invariably writes Domesdei or Domesday, but where the scribe has been manifestly ignorant we generally find Domus Dei.' On Domesday generally, see, for recent views, *Domesday Studies*, i., Lond., 1887, issued by the Domesday Commemoration Committee; and a useful *Popular Account*, by W. De Gray Birch, F.S.A., Lond., S.P.C.K. 1887. Cf. also on special subjects, Papers by the following: O. C. Pell, M.A., on the *Domesday Geldable Hide*, *Trans.* Camb. Ant. Soc. vol. vi., and on a *New View of the Geldable Unit of Assessment*, in *Domesday Studies*, vol. i., and Arts. by same in *Arch. Rev.* vol. ii., 1889, p. 350, and by J. H. Round, M.A., on *Domesday Measures of Land*, in *Arch. Rev.*, 1888, vol. i., p. 285, and 1889, vol. iii., p. 130, and by W. H. Stevenson, in criticism, and O. C. Pell, in defence, on *The Long Hundred*, 1890, vol. iv., pp. 313, 460 (but *N. and Q.*, 7th S. viii., Arts. *s. v.* are not on same subject): and *Eng. Hist. Rev.*, 1890, p. 95, *The Hundreds of Domesday*, by W. H. Stevenson. The reasons which existed for a New Survey of England after the Conquest are briefly but forcibly marshalled by Mr. Stuart Moore, in his Paper in *Domesday Studies*, pp. 10—12, and they may well be accepted as convincing in regard to the fiscal necessity for such a measure, and the general equity with which it was carried out.—ED.]

[1] From Domesday we learn that the vast possessions of the king's brothers, Odo, Bishop of Bayeux, and Robert, Count of Mortain, were scattered over seventeen and nineteen counties respectively. Eudes the steward (dapifer) held fiefs in twelve counties. Hugh (Lupus) of Avranches held lands in twenty-one counties, exclusive of those in his palatine earldom of Chester. See Thorpe's Lappenberg's England under the Normans, p. 201.

[2] Freeman, Norm. Conq. iv. 71.

cial—was, moreover, practically executed by the Sheriff who was directly responsible to the King. An apparent exception to the general policy pursued by the Conqueror occurs in the creation of the three Palatine counties of Chester, Durham, and Kent. The extraordinary powers thus conferred were, however, requisite for the defence of the kingdom against attacks from Wales, Scotland, and the Continent respectively, and two of the persons entrusted with them were ecclesiastics, who could not become the founders of families. A further check to the power of the baronage resulted from the maintenance in full vigour of the popular courts of the Shire and the Hundred, by which the private manorial jurisdictions of the nobles were restrained, as far as possible, within narrow limits.

Counties Palatine.

Feudal tenures.

The political and social influence of the system of Feudal tenure gradually established in England under the Conqueror and his son Rufus has been so vast and so enduring, that it is desirable to take a glance at its outline, in order to a right understanding of the development of our Constitution and laws. The Feudal tenures were, indeed, abolished by Act of Parliament in the reign of Charles II., but the spirit of the system still lives on. It stands revealed in the theory of our law that 'all the lands and tenements in England in the hands of subjects are holden mediately or immediately of the king;'[1] in the law of primogeniture, as applied to the inheritance of real estate; and in the custom of family settlements, by which the old law of entail is practically continued.

Prior to the Conquest all lands had been subject to the *trinoda necessitas.* This obligation still continued. But after the Feudal system of tenure had been fully established, all lands were held subject to certain additional obligations, which were due either to the King (not as sovereign, but as feudal lord) from the original grantees, called tenants-in-chief (*tenentes in capite*), or to the tenants-in-chief them-

[1] Coke upon Littleton, cap. I, sec. I.

selves from their under-tenants.[1] Of these obligations the most honourable was that of *knight-service.* This was the tenure by which the King granted out fiefs to his followers, and by which they in turn provided for their own military retainers. The lands of the Bishops and dignified ecclesiastics, and of most of the religious foundations, were also held by this tenure. A few exceptions only were made in favour of lands which had been immemorially held in *frankalmoign*, or free-alms.

Tenure by knight-service.

On the grant of a fief, the tenant was publicly invested with the land by a symbolical or actual delivery, termed *livery of seisin.* He then did *homage*, so called from the words used in the ceremony: 'Je deveigne votre *homme.*' Humbly kneeling before his lord, with sword ungirt and head uncovered, he placed his hands between those of his lord, and pronounced the words: 'I become your man from this day forward, of life and limb, and of earthly worship; and unto you shall be true and faithful, and bear to you faith for the tenements I claim to hold of you.'[2] The lord then kissed his vassal on the cheek and received the oath of fealty. In the case of a sub-tenant (vavassor), his oath of fealty was guarded by a reservation of the faith due to his sovereign lord the King. For every portion of land of the annual value of £20, which constituted a knight's fee, the tenant was bound, whenever required, to render the services of a knight properly armed and accoutred, to serve in the field forty days at his own ex-

Investiture.

Homage.

Fealty.

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[1] The tenants-in-chief, including the ecclesiastical corporations, enumerated in Domesday, amounted to about fifteen hundred. The under-tenants were about eight thousand in number, and largely consisted of the ousted English owners, who had been reduced from the degree of thegn to the condition of simple freeholders or franklins, holding under a Norman lord.

[2] Littleton (*temp.* Edw. IV.), l. i. c. 10, s. 85. Glanvill (*temp.* Hen. II.) gives the form thus:—'Fieri autem debet homagium sub hac forma, scilicet ut is qui homagium facere debet, ita fiat homo domini sui, quod fidem illi portet, de illo tenemento unde homagium suum praestat, et quod ejus in omnibus terrenum honorem servet, salva fide debita domino regi et haeredibus suis.'—Lib. ix. c. 1. [Cf. Guizot, *Civilisation en France* (Brussels. 1839), iv. p. 249, where is given the form in the *Coutume de la Marche*, art. 189, in nearly identical words:—'Jeo deveigne vostre home de cest jour en avant, de vie et de membres, et foy a vous porterai des tenemens que jeo claime de tenir de vous.'—Ed.]

pense. In addition to service in war-time, the tenants-in-chief were also bound to attend the King's court at the three great festivals of the year; and on the same principle every mesne lord having two or more freehold tenants had a right to compel their attendance (termed suit of court, from *suivre*, to follow) at the court-baron of the manor, as the lordship of pre-Norman times was now termed.[1]

Incidents of tenure by knight-service.

Tenure by knight-service was also subject to several other incidents of a burdensome character, the unfair and oppressive exactions of which by the Norman and earlier Angevin kings supplied one of the chief incentives to the barons who wrested the Great Charter from King John. These incidental burdens were:

Aids.

1. The tenant was at first expected, and afterwards obliged, to render to his immediate lord certain contributions termed *Aids*. These, which were to be reasonable in amount, were due on three special occasions—to ransom the lord's person from captivity; to make his eldest son a knight; and to provide a suitable portion for his eldest daughter on her marriage.[2] The Stat. of Westminster I. (3 Edw. I.) fixed the reasonable aid at 20*s*. for every knight's fee, and for every £20 value of land in socage.

Relief and Primer seisin.

2. On the death of the tenant, his fief descended to his heir, sons being preferred to daughters, and the elder to the younger son. But before taking up his ancestor's estate, the heir, if of age, had to pay a fine called a *Relief*, which closely resembled and was apparently a feudalised form of the ancient English Heriot.[3] By demanding arbi-

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[1] Gilbert, Tenures, 431 *et seq.* 'The name "manor" is of Norman origin, but the estate to which it was given existed in its essential character long before the Conquest; it received a new name as the shire also did, but neither the one nor the other was created by this change. The local jurisdictions of the thegns who had grants of sac and soc, or who exercised judicial functions amongst their free neighbours, were identical with the manorial jurisdictions of the new owners.'—Stubbs, Const. Hist. i. 273. [The kindred word *mesnil*= mansion, is of frequent occurrence in Norman place-names, and has entered into the composition of some English family names of Norman origin, *e.g.*, Mesnilwarine, corrupted into Mainwaring.—ED.]

[2] Glanvill, lib. ix. c. 8; Magna Charta, c. 12 (*infra*, ch. iv.).

[3] Stubbs, Const. Hist. i. 261. [Thus Digby, *History of Law of Real Property* (1884), pp. 39, 40, says, the Relief was confounded with the custom

trary and exorbitant reliefs the Norman kings, William Rufus especially, often obliged the heir in effect to purchase or *redeem* his lands. This abuse was specially provided against in the charter of Henry I., in which the King promised to exact, and required his tenants to exact from their under-tenants, only the accustomed and legal reliefs.[1] Glanvill, in the reign of Henry II., tells us that the reasonable relief for a knight's fee was 100*s.*, but that the sum due for a barony varied *juxta voluntatem et misericordiam domini regis.*[2] The amount was not finally fixed till Magna Charta defined the *antiquum relevium* as £100 for a barony, 100*s.* for a knight's fee.[3]

Tenants-in-chief were subject to a kind of additional relief termed *primer seisin*, which consisted in the right of the King, on the death of one of his tenants leaving an heir of full age, to receive one year's profits of the inherited land.[4]

Wardship.

3. If the heir were under age, the lord was entitled, under the name of *Wardship*, to the custody of his body and lands, without any account of the profits. At the age of twenty-one in males, and sixteen in females, the wards were entitled to *ousterlemain* or 'sue out their livery'—that is, to require delivery of their lands out of their guardian's hands, on payment of half a year's profits in lieu of all reliefs and primer seisins.[5]

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of rendering Heriots on the death of the man or vassal which prevailed before the Conquest, and refers to the Laws of Cnut, 71, 72, for the amounts due as Heriot of an Earl, a King's thane, &c. William's provision on the subject of Reliefs, Mr. Digby derives directly from Cnut's Laws.—Ed.]

[1] Si quis baronum, comitum meorum sive aliorum qui de me tenent, mortuus fuerit, haeres suus non redimet terram suam sicut faciebat tempore fratris mei, sed *justa et legitima* relevatione relevabit eam. Similiter et homines baronum meorum justa et legitima relevatione relevabunt terras suas de dominis suis.—Chart. Hen. I., Thorpe, Anc. Laws and Inst. 215.

[2] Glanvill, lib. ix. c. 4.

[3] *Infra*, ch. iv.

[4] Coke upon Littleton, 77A. It was by analogy to the feudal incident of Primer seisin, that the Popes—who, in carrying out Hildebrand's ideas, claimed to be feudal lords of the lands of the Church—subsequently exacted from every beneficed clergyman in England the *first-fruits* of his benefice.

[5] Wardship and marriage, the most oppressive of feudal exactions, seem not to have been ordinary feudal incidents, but nearly peculiar to Normandy and England (Hallam, Midd. Ages, i. 178). From the charter of Henry I. (*infra*,

Marriage.

4. The lord also possessed the right of disposing of his female wards in marriage. The rejection by the ward of a suitable match incurred the forfeiture of a sum of money equal to the value of the marriage—that is, as much as the suitor was willing to pay down to the lord as the price of the alliance. If the ward presumed to marry without the lord's consent, she forfeited double the market value of the marriage. This right, which applied not only to female wards, but to daughters who were the presumptive heirs of living vassals, was originally intended as a security against the lord being obliged to receive the homage of a hostile or otherwise objectionable tenant;[1] but it was afterwards, without any feudal justification, extended to male wards, and used as a lucrative source of extortion both by the Crown and mesne lords.[2]

Fines on alienation.

5. The right of devising land by will ceased (with a few local exceptions) at the Conquest, and for some time afterwards the freedom of alienation *inter vivos*, which had existed in Anglo-Saxon times, seems to have been limited by certain restrictions in favour of the heir.[3] Indirectly,

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p. 84), it would appear that, so far as they were sources of pecuniary advantage, they were not claimed even in England under William the Conqueror, but were among the novel exactions introduced by William Rufus. Though abolished by Henry I., they were soon re-introduced. The Assize of Northampton, c. 4 (A.D. 1176), expressly gave the wardship of lands to the lord. The feudal lawyers justified the right of wardship on the ground: as to the land, that the infant heir being incapable of rendering the military service, ought not to hold the fief: as to the person of the heir, that it was the interest of the lord to educate him properly for military service. Cf. Fortescue, De Laudibus Leg. Angl. p. 105. [Wardship and marriage undoubtedly prevailed also in Scotland under the Feudal Law. Cf. Sir George Mackenzie of Rosehaugh, *Institutions of the Law of Scotland.* Edin. 1684. Part ii., Tit. v., where both are duly entered into under the 'Casualities due to the Superior.' See also *Lectures on the Government, Constitution and Laws of Scotland*, by Alexander Robertson, M.A. London. 1878. p. 89, citing *Reg. Maj.* II. c. 42.—ED.]

[1] Ne de inimico suo, vel alio modo minus idonea persona, homagium de feodo suo cogatur recipere.—Glanvill, l. vii. c. 12.

[2] Glanvill, l. vii. c. 12; Stat. of Merton, 20 Hen. III. c. 6. Glanvill (*temp.* Hen. II.) expressly limits the lord's right of marriage to female wards. Bracton (*temp.* Hen. III.) extends it to both, 'sive sit masculus, sive fœmina.' The extension of the right to males was based on a strained and iniquitous construction of the word 'haeredes' in Magna Charta (*infra*, ch. iv.). By the Statute of Merton the lord's right of selling the ward in marriage, or else receiving the value of it, is expressly declared.

[3] In a fief granted to a man and his heirs, 'the ancestor and his heirs took

however, alienation of portions of fiefs was effected through the medium of sub-infeudation, a process which by the time of Henry II., had been most extensively applied throughout the country.[1] By this time also the ancestor appears to have acquired a limited right to defeat the expectation of his heir.[2] Subsequently, by the Statute of *Quia Emptores* (18 Edw. I. c. 1) sub-infeudation was forbidden, and every freeman was allowed to aliene his land at pleasure (except by will), to be held not of the alienor, but of the lord of whom the alienor had immediately held. All tenants-in-chief, however, still required a licence from the King before they could aliene, for which a fine was, of course, demanded. By a statute of Edward III.[3] the necessity for a licence was done away with, and tenants-in-chief were allowed to aliene at will, on payment of a reasonable fine to the king.

Escheat and forfeiture.

6. Lastly, there was the valuable right of *Escheat*, by which, on the determination of the tenant's estate,—either on failure of legal heirs (*propter defectum sanguinis*), or on conviction of the actual tenant of felony or treason (*propter delictum tenentis*)—the fief reverted to the lord by whom or by whose ancestors it had been originally granted. Independently of escheat, the lands of a convicted felon were also liable to *forfeiture* to the Crown (which intercepted the escheat to the mesne lord)—in the case of treason, for ever; in other felonies for a year and a day.[4]

Tenure by Grand Serjeanty.

Besides the tenure by knight-service properly so called, there was a species of tenancy in chief by *Grand Serjeanty* (*per magnum servitium*), whereby the tenant was bound, instead of serving the King generally in his wars, to do some special service in his own proper person, as to carry

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equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial, but none of whom possessed or could lawfully dispose of the direct or absolute dominion of the property.'—Coke upon Littleton, 191A, n. (i.) vi. 5.

[1] Report of Lords' Committee on the Dignity of a Peer, 1819, p. 107.

[2] Glanvill, l. vii. c. i.

[3] 1 Edw. III. c. 12.

[4] Wright, Tenures, 44, 120. See Magna Charta, c. 32, *infra*, ch. iv.

the King's banner or lance, or to be his champion, butler, or other officer at his coronation.[1] This was, in fact, merely a continuation of the system which, as we have seen, was early developed in England through the growth of the Thegnhood,[2] and was of the same nature as the fiefs of office so general on the Continent.[3]

Petit Serjeanty.

Grants of land were also made by the King to his inferior followers and personal attendants, to be held by meaner services. Among the tenants-in-chief mentioned in Domesday occur the names of the king's foresters, huntsmen, falconers, farriers, cooks, and similar officers. Hence, probably, arose tenure by *Petit Serjeanty*, though later on we find that term restricted to tenure *in capite* by the service of rendering yearly some implement of war to the King.[4] It was, in fact, merely a dignified species of the tenure in Socage which has next to be noticed.

Tenure in Free Socage.

Tenure in *Free Socage*[5] (which still subsists under the modern denomination of Freehold, and may be regarded as the representative of the primitive alodial ownership) denotes, in its most general and extensive signification, a tenure by any certain and determinate service, as to pay a fixed money rent, or to plough the lord's land for a fixed number of days in the year. In this sense it is constantly opposed, by our ancient legal writers, to tenure by knight-service, where the service, though esteemed more honourable, was precarious and uncertain.[6] Not being held by military service, socage tenure lacked one of the essential elements of a feud, but the spirit of feudalism was all-em-

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[1] Coke upon Littleton, i. 153.

[2] *Supra*, p. 26.

[3] The Count of Anjou, under Louis VI., claimed the office of Great Seneschal of France; *i.e.*, to carry dishes to the King's table on state days.—Hallam, Middle Ages, i. [180]. [Cf. Lavallée, *Hist. des Français*, i. 338.—ED.]

[4] Coke upon Littleton, ss. 159, 160. Per servitium reddendi nobis cultellos, vel sagittas, vel hujusmodi. Mag. Charta, c. 37, *infra*, ch. iv.

[5] *Socage*, from *soca* = a franchise or jurisdiction. [A.-S. *sôc*, from *saken*. Stratmann, *O. E. Dict.*—ED.]

[6] Bracton, l. 2, c. 16, s. 9. The author of Fleta says: Ex donationibus servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale quod est *socagium*.—L. 3, c. 14, s. 9.

bracing and affected every tenure and every institution. Thus we find that tenure in socage, like that by knight-service, was created by words of pure donation accompanied by livery of seisin, and was liable to the obligation of fealty invariably, sometimes of homage; and was in like manner subject, but in a modified form, to many of the incidents of tenure by knight-service. Though considered less honourable than the latter, socage was practically much more beneficial, especially in its freedom from the grievous burdens of feudal Wardship and Marriage.[1]

Besides petit serjeanty, socage tenure comprised two other particular species, burgage and gavelkind.

Burgage.

Tenure in *Burgage* was a kind of town socage.[2] It applied to tenements in any ancient borough, held by the burgesses, of the King or other lord, by fixed rents or services.[3] At the Conquest the cities and boroughs were retained by the King as part of the demesne of the Crown, but a large number were subsequently granted out to his barons. This tenure, which still subsists, is subject to a variety of local customs, the most remarkable of which is that of *Borough-English*, by which the burgage tenement descends to the youngest instead of to the eldest son.[4]

Gavelkind.

Gavelkind[5] is almost confined to the county of Kent,

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[1] The wardship and marriage of an infant tenant of a socage estate (up to the age of 14, when wardship ceased), devolved upon his nearest relation not being one to whom the inheritance could descend. Conversely to the rule in knight-service, the guardian in socage was strictly accountable for the rents and profits; and if he allowed his ward to marry under the age of 14, he was bound to account to the ward for the value of the marriage, even though nothing had been received for it, unless he had married him to advantage. Stephen, Commentaries, i. 312 (5th ed.).

[2] [On Burgage, cf. Digby, *Hist. Law of Real Property*, p. 47, who says that 'by the time of Glanvill,' the 'important class of socage tenants' who held lands of lords by this tenure in towns, 'had obtained the distinctive name of burgage tenants,' and that they 'retained in many cases local customs, especially as to the descent of lands, and as to devising them by will.'—ED.]

[3] Coke upon Litt., ss. 162, 163.

[4] Littleton, s. 165; Third Real Property Report, p. 8. [The Manor of Kennington, it is believed, affords an instance, in what is now practically a London suburb, of the survival of Borough-English.—ED.]

[5] Gavelkind, A.-S. *gafolcund*, = 'rent-yielding' land, *gafol* = 'rent' or 'customarie paiment of woorkes.' Lambarde, Perambulation of Kent [ed. 1826, p. 477]; Kemble, Int. Cod. Dipl. i. lxi. [Cf. *Gavellarii*, *J. R. S. A. Ireland.* Dublin. 1890.—ED.]

whose inhabitants are said to have secured this and other privileges by special favour of the Conqueror.[1] The lands are held by suit of court and fealty, a service in its nature certain.[2] The tenant in Gavelkind retained many of the properties of alodial ownership: his lands were devisable by will; in case of intestacy, they descended to all his sons equally; they were not liable to escheat for felony, the maxim being 'the father to the bough, the son to the plough'; and they could be aliened by the tenant at the age of fifteen.

Tenure in Villeinage.

Below Free Socage was the tenure in *Villeinage*,[3] by which the agricultural labourers, both free and servile, held the land which was to them in lieu of money wages. The terms of the tenancy varied with the local customs of different manors, but it was always more or less precarious. Bracton, writing under Henry III., describes two kinds of tenure in Villeinage, *pure* and *privileged*. *Pure villeinage*, he tells us, was the tenure by which the demesne of mesne lords was held by tenants who, whether free or slave, were bound to do whatever work was set them, and who 'knew not in the evening what was to be done in the morning.' They were occupiers of the land at the lord's will. *Privileged villeinage*, or villein socage, was the tenure by which tenants of the King's demesnes held their land, on condition of performing base services, but certain; and who could not be removed from the land as long as they were willing and able to perform the service due. It was this kind of

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[1] [Digby, *Hist. Law of Real Property*, p. 46, n. 3, remarks that before the Conquest, gafolcund or gavelkind lands meant simply 'rent-paying' lands. As to the survival of this and other customs, Digby says, 'How it was that these customs survived is a question of great difficulty.' That it was the result of any special favour shewn by the Conqueror to the men of Kent does not seem to be capable of proof.—ED.]

[2] Wright, Tenures, 211.

[3] [On Tenure in Villeinage, cf. Digby, *op. cit.*, p. 128. 'The practice of allowing villeins to continue to occupy their lands without interruption, and even to alienate and transmit their interests to their descendants has given a new sense to the word *villenagium*, which has now [*t.* Hen. III.] come to mean (1) the nature of a villein's interest in land; (2) the kind of interest which a villein has, though the land may be held by a freeman.' The relative excerpt, pp. 129—30, from Bracton, l. iv. c. 28, should be studied.—ED.]

'privileged villeins,' or 'villein socmen,' who were properly termed '*glebae ascriptitii*.'[1]

The Conqueror's policy National rather than Feudal.

Whilst availing himself of every advantage which his position as feudal lord paramount gave him over his baronage, William was careful to maintain his rights, and, as a rule, endeavoured to perform his duties, as King of the English; 'preferring the forms of ancient royalty to the more ostentatious position of a feudal conqueror.'[2]

National Witan continued.

He continued to hold, three times a year, at the accustomed times and places, the ancient National Assembly, at which the archbishops and bishops, abbots and earls, thegns, and knights attended.[3] There is some evidence that it even retained for a time its old constitutional name of Witan.[4] But as the feudal principle gradually acquired predominating influence in every department of the state, the National Council almost insensibly changed from the assembly of the Wise Men into the *Curia Regis*, the court of the King's feudal vassals. William made but few changes in the national laws. It was their administration by foreign officials which constituted the grievance most heavily felt. In the fourth year of his reign, when the work of conquest had been completed, he ordained that peace and security should be observed between his English and Norman subjects, and renewed the law of Edward the Confessor, with certain additions made by himself '*ad utilitatem populi Anglorum*.'[5] In like manner Cnut, fifty-two years before, had reconciled the English and Danes at a Gemot at

William's laws.

He renews the law of Edward the Confessor.

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[1] Bracton, l. iv. c. 28. On the personal status of the villeins and the nature of the tenure by which they held their land, see *infra*, ch. viii.

[2] Stubbs, Const. Hist. i. 289.

[3] A.-Sax. Chron. *s. a.* 1087. 'Þriwa he bær his cynehelm ælce geare. swa oft swa he wæs on Englalande. On Eastron he hine bær on Winceastre. on Pentecosten on Westmynstre. on Midewintre on Gleaweceastre. and Þænne wæron mid him ealle Þa rice men ofer eall Englaland. arcebiscopas. and leodbiscopas. abbodas. and eorlas. Þegnas. and cnihtas.' [Bodl. Laud, 636.—Ed.]

[4] A.-Sax. Chron. *s. a.* 1086, *supra*, p. 59.

[5] Hoc quoque praecipio et volo, ut omnes habeant et teneant legem Edwardi regis in terris, et in omnibus rebus, adauctis iis quae constitui ad utilitatem populi Anglorum.—Statutes of Will. Conq. ; Sel. Chart. 81.

Oxford, and renewed the law of Edgar the Peaceful.[1] This renewal by William is the first mention of the famous laws of King Edward, which Normans as well as English soon learnt to demand in every reign, until Magna Charta supplied them with a more substantial foundation for their liberties. By the 'laws of Edward' they probably meant not the laws which he had promulgated but which he had observed.[2] The phrase imported a demand for a mild and good government as opposed to harsh and unjust innovations. But before confirming the English laws, William took measures to ascertain what they were. He directed that in each county twelve representative men,—*Anglos nobiles et sapientes et suâ lege eruditos,*—should be elected to report to him on oath the laws and customs of the English.[3]

Wager of Battle.

Normans and English were, in theory, equal before the law; but the distinction of personal law was, for some purposes, allowed. The Normans were accustomed to the wager of battle,[4] the English to the ordeal and compurgation. King William allowed the man of each race to be tried by the customs of his own country. But *Francigenae* (who would be mostly Normans) settled in England previously to the Conquest were to be treated as Englishmen.[5]

Englishry.

The English frequently revenged themselves on their local tyrants by assassination. To check this, William ordained that the whole Hundred, within whose limits a Norman should be secretly slain, should be liable to a

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[1] Angli et Dani apud Oxenafordam de lege regis Eadgari tenendâ concordes sunt effecti.—Flor. Wigorn. *s. a.* 1018.

[2] The remark is William of Malmesbury's—Non quas tulit sed quas observaverit.—Hallam, Middle Ages, ii. 325.

[3] Hoveden, Chronica, ii. 218, *s. a.* 1070.

[4] 'The trial by battle, which on clearer evidence seems to have been brought in by the Normans, is a relic of old Teutonic jurisprudence, the absence of which from the Anglo-Saxon courts is far more curious than its introduction from abroad.'—Stubbs, Const. Hist. i. 276. [A monograph on *Trial by Combat*, by George Neilson, Writer, Glasgow, published by W. Hodge & Co., Glasgow, is reviewed in *Notes and Queries*, for March 1, 1890.—ED.]

[5] Statutes of Will. Conq.; Select Chart. 80, 81.

heavy amercement.[1] In connexion with this enactment there grew up the famous law of 'Englishry,' by which every murdered man was presumed to be a Norman, unless proofs of 'Englishry' were made by the four nearest relatives of the deceased.[2] 'Presentments of Englishry,' as they were technically termed, are recorded in the reign of Richard I,[3] but not later. Even so early as the reign of Henry II., we are told that the two races (with the exception of the villeins) had become so blended, through intermarriages, that the distinction between Norman and Englishman had almost entirely disappeared.[4]

Public peace maintained.

The public peace which William established and maintained was the greatest benefit of his reign.[5] 'He permitted no rapine but his own.' Meting out stern justice to Norman and Englishman alike, he yet abolished the punishment of death, and substituted what was possibly regarded as the milder punishment of mutilation.[6] He also, like his predecessors Ethelred and Cnut, prohibited the infamous practice of selling men into foreign slavery.[7]

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[1] Statutes of Will. Conq.; Dialogus de Scaccario, lib. i. c. 10: Select Chart. 80, 193.

[2] Bracton, l. 3, tr. 2, c. 15, s. 7. The crime of murder (*murdrum*) was anciently restricted to *secret* killing. 'Murdrum proprie dicitur mors alicujus occulta, cujus interfector ignoratur. Murdrum enim idem est quod absconditum vel occultum.'—Dial. de Scac. lib. 1, c. 10. [On *Murdrum*, cf. Maitland, *Pleas of the Crown, Glouc.* (Introd. xxix.), where the Editor remarks that, in the Roll, 5 Hen. III., 'the word murder is never used to differentiate two degrees of homicidal guilt, it merely means that the slayer has not been caught, and that Englishry has not been presented.' Bigelow, *Hist. of Procedure in Eng.*, 1880, p. 81, speaking of the last quarter of the 12th century, says 'the fine was still imposed in all cases of secret slaying, upon the old presumption,' and suggests what Maitland (*op. cit.*) seems to prove, that 'the *murdrum* must have been more a matter for the Eyre, after the establishment of provincial visitations, than of the central King's Court.'—ED.]

[3] Abbrev. Placit. pp. 13, 17, 18, 19.

[4] Richard, Bishop of London and Treasurer of the Exchequer under Henry II., tells us in his *Dialogus de Scaccario*, lib. i. x.: Sed jam cohabitantibus Anglicis et Normannis, et alterutrum uxores ducentibus vel nubentibus, sic permixtae sunt nationes ut vix discerni possit hodie, de liberis loquor, quis Anglicus quis Normannus sit genere; exceptis duntaxat ascriptitiis qui villani dicuntur, quibus non est liberum obstantibus dominis suis a sui status conditione discedere.—Select Chart. 193.

[5] 'No man durst slay other man had he never so mickle evil done to the other.'—[A.-S. Chron., *s. a.* 1087.]

[6] Statutes of Will. Conq.; Select Chart. 81.

[7] Ego prohibeo ut nullus vendat hominem extra patriam super plenam forisfacturam meam.—*Ibid.* [s. 9.]

The Forest Laws.

The love of field sports amounted in the Conqueror to an ungovernable passion. 'He loved the tall deer,' says the Anglo-Saxon Chronicler, 'as if he were their father;' and the laying waste of 17,000 acres for the formation of the New Forest, in Hampshire, made a deep impression on the popular mind. The Forest laws which William introduced, though not so cruel as they subsequently became under Henry I., were yet marked by extraordinary harshness. The penalty for killing a hart or hind was loss of sight. The killing of even wild boars and hares was forbidden. The beginning of Forest laws is traceable to the legislation of Cnut; but by him the right of every man to hunt on his own ground was expressly recognised.[1] Up to the period of the Conquest, hunting was still regarded not merely as a pastime but as a means of exterminating noxious animals and of procuring food. Under William it became a mere sport for pleasure, and the exclusive privilege of the King and those whom he allowed to share it.[2] Though mitigated under Henry III. and in succeeding reigns, yet 'from this root,' says Blackstone, 'afterwards sprung a bastard slip known by the name of the Game Law,'—a system which, down to the reign of William IV., made it illegal for any man to take or sell game, even on his own land, unless possessed of a real property qualification of at least £100 a year.[3]

The Church.

Previous to the Conquest the English Church had enjoyed what has been termed 'an insular and barbaric independence.' The Conquest brought it into much closer connexion with Rome. Foreign ecclesiastics were substituted in high places for the native clergy. But while the Church lost some of its national independence, it gained in power. As secular government gained in force

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[1] Cnut, Secular Dooms, c. 81.—And I will that every man be entitled to his hunting in wood and in field, on his own possession. And let everyone forego my hunting: take notice where I will have it untrespassed on, under penalty of the full *wite*.

[2] See Freeman, Norm. Conq. vol. iv. [610].

[3] Stephen, Commentaries, iv. 577.

through the strong centralisation system of the Conqueror, so the power of the Church increased through its more complete subordination to the Papacy. The Conqueror, however, had no intention of admitting the interference of the Pope in the English Church or State to a greater extent than he himself might judge to be expedient. He was, indeed, under great obligations to the Papacy, and was at all times regarded as a favoured son of the Church. But he resolutely refused to admit the haughty pretensions of Hildebrand, who in the prosecution of his scheme of Ecclesiastical Feudalism, in which all kings of the earth were to hold their kingdoms as fiefs of the Holy See, called upon William to do fealty for the crown of England.[1] Under the pre-Norman kings the Church and the State had been practically identical, alike subject to the supreme power of the Witan, by whom Kings, Earls, and Bishops were elected and deposed, and laws spiritual and temporal enacted. The Bishop and the Ealdorman sat side by side at the gemot of the shire or hundred, deciding all causes, ecclesiastical as well as civil. One of the most important acts of William's reign was the separation of the Ecclesiastical from the Civil jurisdiction of the courts of law. He directed that from henceforth no bishop or archdeacon should hold pleas of ecclesiastical matters in the shire or hundred court; but that all such pleas should be determined according to the Canon and Ecclesiastical laws before the Bishop, at the place which he should appoint for the purpose All sheriffs and other lay persons were prohibited from interfering in spiritual causes.[2] But in making this change William took care to preserve the ancient supremacy of the State, by laying down his three famous canons of the Royal Supremacy, viz.:—

Cir. 1076.

Separation of spiritual from temporal courts.

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[1] Fidelitatem facere nolui, nec volo; quia nec ego promisi, nec antecessores meos antecessoribus tuis id fecisse comperio.—Epp. Lanfr. ed Giles, No. 10. Montalembert, in the concluding and posthumous volume of his Monks of the West (vii. 27), oddly enough refers to this incident as a refusal by Hildebrand of the homage of William I.

[2] See the Ordinance of William in Ancient Laws and Institutes, ed. Thorpe, p. 213, and Select Chart. 81.

William's three canons of the Royal Supremacy.

1. That no Pope should be acknowledged, or Papal letters received, in England, without the King's consent.

2. That the decrees of national Synods should not be binding without the King's confirmation.

3. That the King's barons and officers should not be excommunicated, or constrained by any penalty of ecclesiastical rigour, without his permission.[1]

A further check on the dignitaries of the church consisted in the tenure of their estates; which from having been held by alodial title, or in frankalmoign (free alms), were for the most part converted into baronies to be held of the King by military service.

Judicial organisation.

The Judicial organisation of the kingdom at the end of William's reign was but slightly altered from what it had been under Edward the Confessor. The spiritual courts had now, as we have seen, exclusive jurisdiction in spiritual matters; but for civil matters the ordinary courts were still those of the shire, the hundred, or the borough, together with the hall-moots, now become the manorial courts-baron of the King or other lord. In the court of the shire all the freeholders of the shire,[2] in the court baron all the free tenants of the manor,[3] continued, as of old, to act as judges, and doubtless gave judgment in accordance with their ancient local customs; but in the shire and hundred courts the Norman sheriff, or *vice-comes*, now presided with

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[1] Eadmer, Hist. Nov. i. p. 6; Select Chart. 79. 'A further usage, which was claimed by Henry I. as a precedent, was the prohibition of the exercise of legatine power in England, or even of the legates landing on the soil of the kingdom without royal license.' Of these rules, Bishop Stubbs remarks: 'There is something Karolingian in their simplicity, and possibly they may have been suggested by the germinating Gallicanism of the day. They are, however, of great prospective importance, and form the basis of that ancient customary law on which throughout the middle ages the English Church relied in her struggles with the papacy.'—Const. Hist. i. 286.

[2] See the accounts of the suits between the Bishop of Rochester and Pichot, the sheriff, on behalf of the king, Text. Roffens. 150; between Bishop Wulstan and Abbot Walter of Veshand [Evesham], 'judicante et testificante omni vicecomitatu,' Hemingi Chartular. p. 77; and between Archbishop Lanfranc and Odo, Bishop of Bayeux, Text. Roff. (Hickes), p. 32.

[3] Coke, Fourth Inst. 46, 268; Co. Litt. 58; Spence, Eq. Juris. i. 100. In Domesday mention is made of one lord lending another some free tenants to make up his court, *propter placita sua tenenda.*

a power and authority far less limited than the power and authority of any of his English predecessors.

The supreme court of the kingdom was the *Curia Regis*, at once the Council of the King and the Witenagemot of the nation, with whose counsel and consent the King discharged both legislative and judicial functions. The immense amount of business to be transacted, the frequent absence of the King in Normandy, and his ignorance of the English language, caused the appointment of a new officer of the highest dignity, the Justiciar, who represented the King in all matters, acted as Regent in his absence, and at all times administered the legal and financial business of the country. The office of Chancellor, who, as official keeper of the royal seal, first appears under Edward the Confessor (the first of our kings who had a seal), was continued; but he was subordinate to the Justiciar, heading the King's clerks or chaplains, who performed the duties of secretaries.

Curia Regis.

Justiciar appointed.

William was reputed to be the most opulent prince in Christendom. His daily income is circumstantially stated by Ordericus Vitalis to have been £1061 10*s.* 1½*d.*, a sum which seems incredible, when tested by the relative value of money then and now. Little trust can be placed in the numerical statements of early chroniclers; but there is no doubt that the Conqueror's revenue was exceptionally large, whilst his expenditure was relatively small. His armies were furnished free of cost by his military tenants, and by the old constitutional *fyrd* or national militia. When he thought fit to employ mercenaries, their cost was defrayed by a Danegeld levied on the whole cultivated land of the kingdom, and by billeting the troops at free quarters throughout the country.[1]

William's riches.

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[1] [After Midwinter, the King caused a great and heavy tax to be exacted over all England; that was for every hide, two and seventy pence. *A.-S. Chron.* Bodl. Laud, 636, *s. a.* 1083.—Ed.] This was three times the rate of the old Danegeld, which, after having been abolished by Edward the Confessor, was now revived in an aggravated form and continued as a permanent, though only occasional, source of revenue. Cf. Freeman, Norm. Conq. iv. 685; Stubbs, Const. Hist. i. 279.

His great power.

As King of the English, feudal superior of his tenants-in-chief, and personal lord of all his subjects, William exercised a power far greater than that which any of his predecessors had ever wielded. Though the formal changes which he had made in our constitution and laws were few in number, his government was practically despotic, and his administration harsh. His tyranny, says Hallam, 'displayed less of passion or insolence than of that indifference about human suffering, which distinguishes a cold and far-sighted statesman.'[1] It was in this spirit that to resist a threatened invasion from Denmark he caused the whole country between the Tyne and the Humber to be laid waste, so that for some years afterwards there was not an inhabited village and hardly an inhabitant left.[2]

Harshness of his rule.

1069.

The reign of the Conqueror was on the whole beneficial to the nation, which required welding together and organising by means of a strong central government; and he himself was both a wise and, from his own standpoint, a just King.[3] But his stern nature and the hardness of his rule made him an object of fear to all ranks of his subjects. In the picturesque language of the Anglo-Saxon Chronicler:—'He was a very stark man and very savage; so that no man durst do anything against his will. He had earls in his bonds who had done against his will; bishops he set off their bishoprics, abbots off their abbotries, and thegns in prison, and at last he did not spare his own brother Odo.' 'Truly in his time men had mickle suffering and very many hardships. Castles he caused to be wrought and poor men to be oppressed. He was so very stark. He took from his subjects many marks of gold and many hundred pounds of silver: and that he took, some by right and some by mickle might, for very little need.' 'He let his lands to fine as dear as he could: then came some other and bade more than the first had

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[1] Middle Ages, ii. [302].

[2] Will. Malmesb. Gesta Regum, l. iii. s. 249.

[3] Gregory VII. in his Epistles (Ep. vii. 33), calls William 'gemma principum;' and extols his love of justice. [Ep. iv. 18.]

given, and the King let it to him who had bade more. Then came a third and bid yet more, and the King let it into the hands of the man who bade the most. Nor did he reck how sinfully his reeves got money of poor men, or how many unlawful things they did. As man spake more of right law, so man did more unlaw. His rich men moaned and his poor men murmured: but he was so hard that he recked not the hatred of them all.'[1]

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[1] Anglo-Saxon Chron. pp. 189—191.

[Digby, *Hist. Law of Real Property*, 1884, devotes sect. ii. of his chap. i. to the consideration of the 'effects of the Norman Conquest upon the land law of England.' He warns us, p. 33, that 'it must not be supposed that a new system of rules of law was consciously introduced and forced upon the conquered race; the new structure was owing to the political and social changes wrought by the great Conquest, to the process of settlement and reorganisation under a powerful ruler, who would brook no *imperium in imperio*, and to the convergence of two distinct streams of customary law.' Bigelow, *Hist. Proc. Eng.*, devotes chap. iii. to the Courts of the Norman period. As to William's character, Bowden, *Life of Gregory VII.*, Lond. 1840, taking on the whole the Ecclesiastical view, says, vol. ii., p. 260, 'William had, after his conquest of England, been the great restorer of religion in that then irreligious kingdom, . . . and in reference to matters strictly ecclesiastical,—though he ruled these with a despotic sway, of which Gregory could not approve,—his liberality to churches and monasteries was magnificent, while he was entirely free from the crime of simony:'—a singular mixture of praise and blame, hardly up to the Hildebrandine 'gemma principum.'—Ed.]

CHAPTER III.

REIGNS OF THE NORMAN AND FIRST ANGEVIN KINGS.

Wiliam Rufus, A.D.	1087–1100	*Henry II.* A.D.	1154–1189
Henry I.	1100–1135	*Richard I.*	1189–1199
Stephen.	1135–1154		

WILLIAM RUFUS. 1087—1100.

THE Constitutional importance of the reign of WILLIAM RUFUS consists mainly: (1) in the systematic elaboration by Ranulf Flambard of the theory of the incidents of Feudal tenure, and its rigid application in practice, as a fiscal expedient, to ecclesiastical and lay tenants alike; and (2) in the continued struggle between the Royal and Feudal powers, which caused the King to throw himself upon the support of the native English, and led to the ultimate breaking up of the baronage of the Conquest. A despot of the worst sort, William devoted himself almost entirely to his pleasures, and after the death of Archbishop Lanfranc, his ablest adviser, left nearly all the work of government to his Justiciar. This great official was not, as in the Conqueror's days, a powerful baron, but a humble and clever Court chaplain of congenial and compliant tastes, Ranulf Flambard,[1] by whom the Church, the feudal vassals, and the people, were all subjected to systematic oppression

Ranulf Flambard

[1] Ranulf is by some said to have come over to England prior to the Conquest, being supposed to be the Ranulf who occurs in Domesday, i. 51, as a small landowner in Hampshire, T. R. E. He was afterwards, perhaps, in the service of Maurice, Bishop of London; and then Chaplain to William Rufus, who, after a time made him Chief Justiciar. (Ord. Vital. x. 18: Ang. Sac. i. 706.) [Freeman, *Reign of William Rufus*. 1882. i. 329, and App. S., says that Ranulf's early history is not easy to trace, and doubts his having been with Bp. Maurice (1086—1107), but thinks the office which he held was that of Justiciar.—ED.]

and extortion. As Justiciar, he controlled and directed the whole fiscal and judicial business of the Kingdom; and in order to supply the prodigality of the master who had raised him to this exalted position, he directed his ingenuity—like Empson and Dudley four centuries later[1]—to turning the feudal rights of the King and the procedure of the Courts of justice into instruments of pecuniary extortion. The feudal incidents of relief, wardship, and marriage, which, under the Conqueror, had been based on true feudal principles, and, for the most part, reasonably exacted, were now systematically organised as a method of arbitrarily taxing the tenants-in-chief, under colour of exacting a legal due.[2] The system of extortion thus fixed upon the tenants of the King was naturally, indeed necessarily, extended by them to their sub-tenants, and in this way all holders of land by military tenure became subject to the new imposts.[3] The fiefs of the Church were assimilated by Ranulf as far as possible to lay fiefs. Bishoprics and abbeys were purposely kept vacant for years together, during which time the king claimed, on the analogy of the wardship of a lay fief, to receive all the profits for his own use; and when at length a successor was nominated to the vacant benefice, a fine was demanded equivalent at least to the relief which would have been payable by a lay heir.[4]

Struggle between the Royal and Feudal powers. [1073.]

The great struggle between the Royal and Feudal powers, which began under the Conqueror himself in the conspiracy of Ralph [de] Guador, Earl of Norfolk or East

[1] *Infra*, ch. x.

[2] *Supra*, pp. 64—6.

[3] The mesne tenant had a legal right to the assistance of his sub-tenants to meet the feudal claims of the lord paramount. Glanvill, lib. ix. c. 8: 'Postquam vero convenerit inter dominum et haeredem tenentis sui de rationabili relevio dando et recipiendo, poterit idem haeres rationabilia auxilia de hominibus suis inde exigere.'

[4] Ord. Vital. viii. 8; 'He desired to be the heir of every one, churchman or layman.' A.-Sax. Chron. *s. a.* 1100; Stubbs, Const. Hist. i. 300. [Freeman, *Reign of William Rufus*, i. 341, calls Ranulf Flambard the law-giver of feudalism in England, and remarks upon the fact that though he had served under the Conqueror, probably aiding in the Domesday survey, he was not promoted till the reign of the Red King, whose views he 'thoroughly suited.'—ED.]

Anglia, and Roger of Breteuil, Earl of Hereford,[1] was actively carried on under Rufus. Taking advantage of the claim of Duke Robert to the throne of England, the larger part of the barons eagerly seized the opportunity of siding with him against the King. Seven years later an attempt was made to set aside the line of the Conqueror altogether in favour of Stephen of Aumale, grandson of Duke Robert II. of Normandy.[2] On both occasions the insurrections

Rebellion of the barons.

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[1] [These two Earls were brothers-in-law, Ralph de Guador, or de Gael, having married Emma, sister of Roger de Breteuil, for whose descent, cf. *Annals of Chepstow Castle*, by the late John Fitchett Marsh, edited by Sir John Maclean, F.S.A. Privately printed. Exeter. W. Pollard, 1883. This work includes tabular pedigrees of the Houses of Clare, Eu, Fitz-osbern, Marshal, and other great Anglo-Norman baronial families, the understanding of whose relationships throws no little light on the history of England during the Anglo-Norman and Angevin period. The insurrection is described by Pearson, *Hist. Eng. Early and Midd. Ages*, i. 369—70, as arising out of the heated discussion of their grievances among the wedding guests. Ralph, or Raoul, variously styled de Guador or de Gael, was, as Pearson notes, *loc. cit.*, a grand-nephew of the late king, *i.e.*, Edward the Confessor, being grandson of 'Goda Comitissa,' as she is styled in Domesday, sister of the Confessor, not, it would seem, as apparently held by Pearson, *op. cit.*, *u. s.*, by her second husband, Walter, Count of Mantes and Pontoise, who *d. circa* 1044—51, but, as Eyton holds, *Dorset Domesday*, p. 79, *n.* 1, by her first husband, Drogo, Count of the Vexin, who *d.* in Palestine *circa* 1035. Goda's third husband was Eustace II., Count of Boulogne, but Eyton distinctly states that she had no issue by the last two. Ralph, the Staller of the Confessor, was Countess Goda's eldest son, the second, Walter, succeeding his stepfather as Count of Mantes. George, *Gen. Tables*, assigns only two husbands to Goda, *viz.*, Drogo (1) and Eustace (2), but agrees with Eyton in making Ralph, whom he calls Radulph, the son of Goda and Drogo.—ED.]

[2] [The statement in the text that Stephen was grandson of Robert II. of Normandy seems to be an error for Robert I. The account given by Green, *Hist. Eng. People*, Lond. 1878, i. 136, is extremely brief, and does not in any way affiliate this rather shadowy claimant on the Royal stock, and it is somewhat confusing from Anglicising his name as Stephen of Albemarle. Mr. Hereford B. George, in his *Genealogical Tables*, 1875, does not mention this Stephen. It appears, however, from a comparison of Tables CIV. and LXXXVIII., of Bouillet's *Atlas d'Hist. et de Géog.*, Paris, 1866, that Adelaide, an illegitimate daughter of Robert I. of Normandy, variously known as Robert the Devil, or the Magnificent, married Eudes II., Count of Champagne and of Aumale, who *d.* after 1063, and who is noted by Bouillet as 'tige des Comtes d'Aumale.' It is clear that Stephen of Aumale was a son of this marriage, and he is so given by G. E. C. in his *New Peerage*, in *Genealogist*, N. S. vol. i. 1884, *s. v.* Albemarle, where his mother is called Adeliza: he was, therefore, a descendant of the Conqueror's ancestors, but not of the Conqueror himself, and the line of which the Conqueror was the stock would have been set aside, while the lineage of the Conqueror would have been to a certain extent retained, though only through an illegitimate channel, and all connection with the old English stock would have been severed. There seems to be no mention of Stephen of Aumale in the genealogical tables appended to Mr. Bailey's valuable *Succession to the Crown*. Nor does he occur in the

were unsuccessful; and being followed by considerable forfeitures, served only to bring about the decay, ultimately the almost utter extinction, of the baronage of the Conquest.[1] In order to maintain his ground, the King was compelled to court the support of his English subjects, who eagerly and successfully fought for him against their feudal oppressors. On three separate occasions—at his coronation, at the outbreak of the rebellion of his Norman barons almost immediately afterwards, and again in 1093, when ill and in fear of death—he sought to engage the affections of the people by issuing Constitutional manifestoes in which he promised good laws, lighter taxation, and free hunting.[2] But his promises were never kept. Instead of the free hunting promised, he made the capture of a stag a capital offence.[3]

William II. seeks the support of the English:

and promises good laws.

HENRY I. 1100–1135. Charter of Liberties.

HENRY I., on his accession, issued a Charter of Liberties which is in form an amplification of the covenant made by the King with his people in the coronation oath. Copies were despatched to the several counties and deposited in the principal monasteries. In this Charter Henry endeavoured to propitiate all classes of his subjects by abolishing the *malae consuetudines*, the illegal exactions with which the

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Royal Lineage as prefixed in tabular form to Burke's *Peerage*, which only professes to exhibit the descent from the Conqueror. A claim, however shadowy in itself, such as that of Stephen of Aumale, which would have brought an entirely different House to the Throne, seems deserving of a clearer statement than is to be met with in the ordinary sources, and it has, therefore, been deemed advisable to set forth here what is the present Editor's conclusion as to its nature. It is curious that G. E. C., while noticing two conspiracies of Stephen of Aumale against Henry I., on behalf of other claimants, says nothing of his having himself been put forward as a claimant. But the whole subject seems to have been involved in some obscurity, and to demand more attention than it has hitherto received.—ED.]

[1] Stubbs, Const. Hist. i. 294.

[2] Will. Malmesb., Gesta Regum, lib. iv. § 306; Eadmer, Hist. Nov. i. pp. 14, 16.

[3] Venationes quas rex prius indulserat, adeo prohibuit ut capitale esset supplicium prendisse cervum.—Will. Malm. Gesta Reg. iv. § 319.

'The king's acknowledgments of his duty were not however without their value. . . . He had testified to the nation his own duty and their right. . . . If the reign of William Rufus had no other importance it taught a lesson of profoundly valuable consequence to his successor.'—Stubbs, Const. Hist. i. 297.

clergy, the baronage, and the people generally had been oppressed during the reign of the late King. (1) To the Church he promised that on the death of an archbishop, bishop, or abbot, he would neither sell nor let to farm, nor accept anything from, the possessions of the Church or its tenants, during the vacancy of the benefice. (2) To his barons and other tenants-in-chief he promised a remission of various illegal exactions, to which they had been subjected under cover of the incidents of feudal tenure. The heir should not be compelled to *redeem* his land, as in the time of the late king, William Rufus, but should pay only a lawful and just relief. The King's licence for the marriage of his vassal's daughter or other female relative must still be obtained, but it should be given without payment, and should not be refused unless the intended husband were the king's enemy. In the case of an heiress the King would take the advice of his baronage before giving her in marriage. Widows should not be given in marriage against their will. Widows without children should possess their dowers unconditionally; if with children, so long as they continued chaste.

(i.) The Church.

(ii.) The vassals.

Reliefs.

Marriages.

Dower.

Wardships.

The wardship of the persons and lands of children should belong to the mother or other relation.

Demesne of military tenants.

Knights, holding by military service, should have their demesne lands free from all *gilda* and *opera*, in order that they might the more efficiently equip themselves for the defence of the King and kingdom.

Testaments.

Intestacy.

The right of the King's vassals to bequeath their personal property by will was recognised; and in case of intestacy, the deceased person's wife, children, relations, or vassals legally authorised, were to dispose of it for the good of his soul, as to them should seem good.

Fines.

Fines for offences should not be assessed at the King's mercy, as in the time of his father and brother, but according to the nature of the offence, as in the time of the King's 'other ancestors.' Thus early had the Norman barons begun to claim for themselves the benefit of the old English laws.

(3.) To the Nation at large the King granted the laws of Edward the Confessor with the emendations made by the Conqueror with the consent of his barons.[1] The claims of the people were also recognised in the proclamation of the King's peace, and especially in the express extension to all under-tenants of the benefits granted to the King's immediate vassals. The King further promised to exact no moneyage which had not been levied in the time of King Edward, and to punish all coiners or utterers of base money. He forgave the debts due to his late brother; and all murder-fines (*murdra*) up to the day of his coronation. Such fines should in future be regulated by the law of King Edward.[2]

(iii.) The Nation.

The only unpopular clause in the charter was that in which Henry declared his intention to retain the forests in his own hand as his father had held them, a personal indulgence for which he pleads the 'common consent' of his barons.

Forests retained.

This Charter of Liberties is the sole legislative enactment of Henry's reign; for the so-called 'Laws of Henry I.,' were compiled at a later date.[3] Historically the Charter records the nature and recent introduction of the illegal exactions which it specifically abolishes; Constitutionally it is important as a formal and deliberate recognition, by a practically despotic king, of the ancient and lawful freedom of the nation, and of the limitation of the Royal power. It seems to have been re-issued by Henry at various times; but as soon as he found himself firmly seated on the throne,

So-called *Leges Henrici Primi.*

Historical and Constitutional importance of Henry's charter.

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[1] Cap. 13. Lagam Edwardi regis vobis reddo cum illis emendationibus quibus pater meus emendavit consilio baronum suorum.

[2] See the charter in full in Ancient Laws and Institutes, p. 215, and Select Chart. 96.

[3] The so-called *Leges Henrici Primi* are 'a collection of legal memoranda and records of custom, illustrated by reference to the civil and canon laws, but containing very many vestiges of ancient English jurisprudence. The date of the compilation is later than the reign of Henry I.' . . . 'It would appear to give probable but not authoritative illustrations of the amount of national custom existing in the country in the first half of the 11th century, but cannot be appealed to with any confidence, except where it is borne out by other testimony.'—Stubbs, Select Chart. 100.

he never hesitated to disregard its provisions. It was renewed by Stephen and by Henry II.; and under John it served, in the hands of the Archbishop, Stephen Langton, as a text upon which the barons founded their claim for a restoration of the ancient liberties of the nation.

Henry courts and receives support of the Native English.

His somewhat questionable title to the throne, the contest with his brother Robert, and the difficulty of keeping in check a turbulent and powerful baronage, caused Henry to court the alliance and support of the native population. The people were already predisposed in his favour, as being the first of the new dynasty who had been born and educated in England. His politic marriage with the 'good Queen Maud,' daughter of Malcolm Canmore, King of Scots, by Margaret, sister of Edgar Atheling, gave him a still stronger claim to national support. Moreover, the feudal barons, ever seeking to achieve their independence, were the common enemies of both king and people. Impelled alike by national sentiment and unity of interest, and encouraged by the King's promises of good government, the people steadily supported the Crown against all assailants. Henry was thus enabled to obtain a complete triumph over his rebellious vassals, many of the most powerful of whom, including Robert de Belesme, Earl of Shrewsbury and Arundel, the most dangerous of them all, were expelled the kingdom with the forfeiture of their English estates.[1] In the end Henry acquired a plenitude of Royal power equal, if not superior, to that which the Conqueror had enjoyed. In the redistribution of the forfeited lands and jurisdictions he carried out his father's policy of keeping within moderate limits the possessions of any one vassal. As a further check to the still formidable nobility of the Conquest, he raised to the baronage a

Marries a niece of Edgar Atheling.

Triumphs over the rebellious barons.

Raises up new men.

[1] The expulsion of Robert de Belesme is vividly described by Ordericus Vitalis. The English were overjoyed at his downfall. 'Omnis Anglia, exulante crudeli tyranno, exultavit, multorumque congratulatio regi Henrico tunc adulando dixit, "Gaude rex Henrice, Dominoque Deo gratias age quia tu libere coepisti regnare ex quo Rodbertum de Belismo vicisti et de finibus regni tui expulisti."'—Eccl. Hist. xi. 3.

number of new men, whom he placed on an equality with the proudest of their fellow-barons.[1]

Strengthens jurisdiction of County and Hundred Courts.

During the late reign the feudal nobles appear to have extended their local hereditary franchises to the detriment of the national courts of the shire and the hundred. Henry restored the jurisdiction of these courts to its ancient vigour by ordering that they should be held at the same places and during the same terms as in the time of King Edward. All suits respecting lands between tenants-in-chief of the Crown were to be determined in the King's court, but like suits between vassals of different mesne lords were to be heard in the County court.[2] The proper jurisdiction of the baronial court over the disputes of two or more tenants of the same lord was not interfered with.

Charters to boroughs.

The King also granted charters to several boroughs confirming and augmenting their ancient privileges. His charter to the citizens of London is remarkable for the amount of municipal independence and self-government which it accorded. But London had always held an exceptional position ; and its privileges were far in advance of those as yet granted to the other towns of the Kingdom.[3]

Royal administration centralised and systematised.

At the same time that Henry strengthened the local courts of the shire, the hundred, and the borough, as a check to the feudal nobility from below, he endeavoured to curb them from above by centralising and systematising the Royal administration. Roger, bishop of Salisbury, having served as Chancellor from 1101 to 1103, was

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[1] Plerosque illustres pro temeritate sua de sublimi potestatis culmine praecipitavit, et haereditario jure irrecuperabiliter spoliatos condemnavit. Alios contra favorabiliter illi obsequentes de ignobili stirpe illustravit, de pulvere, ut ita dicam, extulit, dataque multiplici facultate super consules et illustres, oppidanos exaltavit.—Ord. Vit. Eccl. Hist. xi. c. 2 ; Select Chart. 94.

[2] See the charter in Rymer, i. 12, and in Select Chart. 99. The address 'Henricus Rex Anglorum Samsoni episcopo et Ursoni de Abetot et omnibus baronibus suis Francis et Anglis de Wirecestrescira salutem,' is remarkable for two reasons : (1) The Bishop of the diocese is joined with the Sheriff, in the ancient form, notwithstanding the separation of the spiritual and temporal jurisdictions decreed by the Conqueror ; (2) English *barons* are mentioned.

[3] Compare the charter to London with those to Beverley and Newcastle-on-Tyne.—Select Chart. 102—108.

appointed, in 1107, Chief Justiciar. Under his direction, during his thirty-two years' tenure of this high office, the administration of the *Curia Regis* was organised for judicial and financial purposes. A regular routine of business was established. The annual courts were still held *de more*, during the great festivals, at Gloucester, Winchester, and Westminster; but as these were found inadequate for the increasing business of the nation, the Chief Justiciar, accompanied by some of the other Justices of the King's court, began, towards the end of Henry's reign, to make occasional circuits round the kingdom, principally for fiscal but partly also for judicial purposes. The local courts were thus brought into closer connexion with the supreme national tribunal. By introducing order and system into the administration of law and government, Henry prepared the way for the important reforms which the reign of his grandson will present to our notice.

[Organisation of *Curia Regis*.]

Occasional circuits of the Justices.

Severity in punishing offences against the law.

The severity with which Henry punished offences against the laws caused him to be popularly regarded as the 'Lion of Justice' described in the prophecies of Merlin. William Rufus had reintroduced the punishment of death for offences against the Forest laws; by Henry it was extended to ordinary crimes. In the year 1124 no less than forty-four thieves were hanged in Leicestershire at one time. 'No man,' says the Anglo-Saxon Chronicle, 'durst misdo against another in his time. He made peace for man and beast. Whoso bare his burden of gold or silver, no man durst say to him aught but good.'[1] By severe punishments he effectually checked the malpractices of the moneyers, which had caused a general depreciation of the coinage. He also checked the abuse of the Royal right of purveyance by the officers of his court. But the expenses of his foreign wars and home administration necessitated the imposition of heavy and regular taxation, of which the contemporary chroniclers complain in bitter terms.[2]

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[1] Ang.-Sax. Chron. *ad ann.* 1135; Select Chart. 95.

[2] Non facile potest narrari miseria quam sustinuit isto tempore terra

Question of Investitures.

After the triumph of Henry over the feudal baronage, the only class in the State strong enough to offer any resistance to the Royal power consisted of the clergy. The contest between the King and Archbishop Anselm on the question of Investitures ended in a compromise. The ring and crosier, as denoting spiritual jurisdiction, were in future to be conferred by the Pope; fealty and homage, being civil duties, were still to be rendered to the King, in return for the temporalities of the see. Thus the national Church regained her spiritual freedom, which the rapid growth of the Feudal principle had injuriously affected, and the King retained all that he could justly claim—the supremacy in things temporal. The chief Constitutional importance of the struggle consists in the successful imposition of a limit to the Royal power.

STEPHEN, 1135–1154.

His first charter.

On his coronation, STEPHEN issued a Charter briefly confirming, in general terms, to the barons and men of England all the liberties and good laws which his uncle Henry, King of the English, had granted them, as well as all the good laws and good customs which they possessed in the time of King Edward.[1] After a short interval the King held his first Great Council at Oxford, at which most of the English, together with several Norman, prelates and barons attended. In this assembly a second Charter was drawn up and promulgated by the King. It is more definite in form than the earlier one, and partakes more of the nature of a solemn compact between the King and the Nation. It was attested by no less than thirty-seven witnesses, of whom fourteen were bishops (eleven English and three Norman), and the rest lay vassals, for the most part of high rank and official position.

His second charter, 1136.

As Stephen owed his election chiefly to the favour of the clergy, who were greatly influenced by his brother Henry, Bishop of Winchester, it is not surprising to find

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Anglorum propter exactiones regias.—Flor. Wigorn. *s. a.* 1104. See also A.-Sax. Chron. *sub ann.* 1104, 1105, 1110, 1118, 1124.

[1] Statutes of the Realm—Charter of Liberties, p. 4.

the greater part of the charter devoted to concessions to the Church. (1) The King promised to repress all simony, and to maintain the jurisdiction of the bishops over all clerical persons and their possessions. Ecclesiastical dignities, with their privileges and ancient customs, should remain inviolate. The Church should retain possession of all estates which it had enjoyed by an uncontested title at the death of the Conqueror, or which the liberality of the faithful had since then conferred. But if it should demand anything which it held or possessed prior to the death of the Conqueror, but had since lost, the King reserved to his indulgence and dispensation either to refuse or restore it. He renounced all claim to the property of deceased clergymen, whether dying testate or intestate; and ordered that every vacant see with its possessions should be committed to the custody of the clergy, or other upright men of such see, until a pastor be appointed. (2) To the people generally Stephen promised to maintain peace and justice in all things. All exactions and extortions, wickedly introduced by sheriffs or any other persons, he totally abolished; and promised to observe and cause to be observed good laws and the ancient and just customs in cases of *murdrum* and other pleas and suits. He reserved to himself the forests made and held by William, his grandfather, and William, his uncle; but those added by King Henry he restored to the Church and realm. All these things the King granted and confirmed 'saving his royal and just dignity'—a somewhat vague and elastic reservation.[1]

(i.) Concessions to the clergy.

(ii.) And to the nation.

The Forests.

During the tumult and anarchy of what can scarcely be termed the 'reign' of Stephen, in which all central authority collapsed, the provisions of these Charters fell into abeyance, together with the whole Legal and Administrative machinery.[2] But they are important as forming

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[1] Statutes of the Realm—Charter of Liberties, p. 3.

[2] [Bigelow, *Hist. Procedure in Eng.*, p. 174, notes one striking exception to this general breakdown. 'The clergy,' he says, 'had preserved the only

another link in the chain by which the ancient liberties of the nation, symbolised in the popular mind by the Laws of Edward the Confessor, were handed down in unbroken series to the framers of the Great Charter.

Feudal anarchy.

Brave, energetic, and personally popular, Stephen lacked administrative ability and the art of governing men. The barons, taking advantage of his weakness, fortified their castles, and, under colour of supporting either the King or the Empress, made themselves practically independent of both. They claimed and exercised all the most obnoxious privileges of Continental Feudalism. *Quot domini castellorum*, says the chronicler, *tot reges vel potius tyranni*.[1]

Creation of new Earls.

The King endeavoured to strengthen his position by creating new Earldoms, supported by extravagant grants from the crown-lands and the exchequer. The only result was to impoverish himself and arouse the jealousy of the old nobility.

Arrest of the Bishops, June 24, 1139.

His justifiable but impolitic violence towards the three bishops, Roger of Salisbury and his nephews, Nigel of Ely and Alexander of Lincoln, secured, indeed, the surrender of their castles, but alienated the entire body of the clergy, who had been the King's chief supporters, and threw into confusion the whole administration of the government, over which Bishop Roger, as Justiciar, had hitherto continued to preside.[2] Even the King's brother, Henry of Winchester, went over to the side of the Empress.

Wretched condition of the people.

During the long period of civil war the condition of the people was most lamentable. Both sides

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semblance of order and good government during the turmoil of Stephen and Matilda; and it was through their power and intervention that the peace of Wallingford had been effected.' The same writer suggests (*loc. cit.*) the probable influence of the clergy, aided by the then very recent teaching of the Roman Civil Law by Vacarius, upon the establishment of Recognitions as a permanent feature of the existing writs of Disseisin.—ED.]

[1] Castella quoque per singulas provincias studio partium crebra surrexerant, erantque in Anglia quodammodo tot reges vel potius tyranni, quot domini castellorum, habentes singuli percussuram proprii numismatis, et potestatem subditis, regio more, dicendi juris.—Will. Newb. Hist. Angl. l. i. 22.

[2] 'The arrest of Bishop Roger was perhaps the most important constitutional event that had taken place since the Conquest; the whole administration of the country ceased to work, and the whole power of the clergy was arrayed in opposition to the King. It was also the signal for the civil war, which lasted with more or less activity for fourteen years.'—Stubbs, Const. Hist. i. 326.

employed mercenary troops, principally from Flanders, who behaved with the greatest insolence and barbarity. 'In this King's time,' says the Anglo-Saxon Chronicler, 'was all dissension and evil and rapine . . . . Never yet was there more wretchedness in the land.'[1]

Peace of Wallingford, 1153.

At length, in 1153, after the death of Stephen's eldest son Eustace, a pacification was brought about at Wallingford, through the mediation of the Bishops.[2] It was agreed between the King and young Henry, Matilda's son, now in his twenty-first year, and ratified by the assent and homage of the Bishops and Barons on both sides, that Henry should give up his claim to the present possession of the throne, and should be acknowledged as the rightful successor on the death of Stephen.

Scheme of reform.

As a part of the pacification a comprehensive scheme of reform was drawn up, to be carried out by both Stephen and Henry, for the restoration of good government and national prosperity. It included the resumption by the King of the Royal rights which had been usurped by the barons; the restoration to the lawful owners of the estates of which they had been deprived by intruders; the razing of the 'adulterine,' or unlicensed, castles; the restoration of agriculture by means of a system of State subventions to the impoverished farmers; the maintenance of the rights of the clergy; the revival of the sheriffs' jurisdiction, and the appointment of impartial men to that office; the disbandment of the armed forces; the banishment of the foreign mercenaries; the strict administration of justice; the encouragement of commerce, and a reform of the coinage.[3]

Death of Stephen.

In less than a year from the date of the treaty, the death of Stephen, on the 25th Oct., 1154, handed over the imperfectly accomplished work of restoring order and good government to Henry of Anjou.

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[1] A.-Sax. Chron. (ed. Ingram), pp. 364, 367.

[2] Matt. Paris [*Chron. Maj.*, ed. Luard, ii. 191.—ED.], *s. a.* 1153; Sel. Chart. 112.

[3] Stubbs, Const. Hist. i. 333.

HENRY II. 1154–1189.

HENRY II. succeeded to the throne, pursuant to the treaty of Wallingford, without the faintest appearance of opposition. The regularity of his succession was doubtless facilitated by the great strength which his extensive Continental possessions gave him.[1] To the English people, moreover, he was welcome as a descendant of their ancient Royal house; and throughout his reign they faithfully supported him in every emergency. But though claiming, through his mother, to be at once Norman and English, Henry was by birth and character neither Norman nor English.[2] He was the founder of a new and foreign dynasty, the Angevin, or Plantagenet, as it was subsequently called,[3] which was destined to rule over England for a period of more than three centuries (viz., 1154–1485). Henry himself endeavoured to rule England as an English king, and he was far too able and energetic ever to succumb to a favourite, foreign or native. But under his sons Richard and John, and his grandson Henry III., the evils of a foreign dynasty made themselves felt, and the descendants of both English and Norman alike experienced the bitterness of being governed by a set of foreign favourites, supported by the swords of foreign mercenaries.

The Angevin dynasty.

Henry II. had the advantage of coming to the throne after a long civil war, during which the nation had become thoroughly weary of anarchy. At his coronation, or shortly

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[1] From his father Henry had inherited Anjou and Touraine; in right of his mother he possessed Normandy and Maine, and with his wife Eleanor, who had been divorced from Louis VII. of France, he had received the seven provinces of Poitou, Saintonge, Auvergne, Périgord, Limousin, Angoumois, and Guienne. 'A third part of France, almost the whole western coast from the borders of Picardy to the mountains of Navarre, acknowledged his authority; and the vassal who did homage to the sovereign for his dominions was in reality a more powerful prince than the king who received it.'—Lingard, ii. 189. [For this reign see *The Court, Household, and Itinerary of Henry II.*, by R. W. Eyton, M.A., 1878. For Henry II. and Louis VII., cf. Lavallée, *Hist. des Français*, Paris, 1863, i. 337–9, who considers both Kings as equally French, and regards the result as a victory for Feudal Monarchy.—ED.]

[2] See Freeman, Growth of Eng. Const. 72. 'The peculiar position of Henry II. was something like that of the Emperor Charles V.—that of a prince ruling over a great number of distinct states without being nationally identified with any of them. Henry ruled over England, Normandy, and Aquitaine, but he was neither English, Norman, nor Gascon.'—*Ibid.* 177.

[3] 'The Angevin family are commonly known as the Plantagenets; but the name was never used as a surname till the fifteenth century.'—*Ibid.* 176.

afterwards, he issued a Charter, briefly and in general terms granting and confirming to the Church, and all earls and barons, and all his men, all the liberties and free customs granted by the Charter of his grandfather, King Henry, and abolishing and remitting all the evil exactions which that King had abolished and remitted.[1] Without any delay the young King set himself energetically to the task, which he persistently worked at throughout his reign, of establishing law and order upon a permanent basis.[2] Taking as his immediate model the government of his grandfather, Henry I., he reconstructed the disorganised administrative and judicial machinery of the kingdom, but with developments and innovations which were the outcome of his own individual policy.[3]

Charter of Liberties.

Establishes law and order.

Inquest of Sheriffs. 1170.

His determination to prevent peculation and other abuses in the administration of the Royal officials, is shown by his remarkable action in 1170, when in a Great Council at London he dismissed all the sheriffs of the kingdom, with their bailiffs, for alleged misconduct in their office. The dismissed functionaries were compelled to give pledges to answer, and make compensation for, all wrongful exactions proved against them, and a special Commission was issued by the King with instructions to make in every county an exhaustive inquisition by the oaths of all the barons, knights, freeholders, and even the villeins of such county, into the receipts of the sheriff and of all persons in any way accountable to the Exchequer.[4]

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[1] Statutes of the Realm—Charter of Liberties, p. 4.

[2] ['The reign of Henry II.,' says Digby, *Hist. Law of Real Prop.*, p. 64, 'is the starting-point of the history of modern English law, as well as of the modern English Constitution.'—ED.]

[3] 'Henry II. is the first of the three great kings who have left on the constitution indelible marks of their own individuality. . . . Each of the three sovereigns had a strong idiosyncrasy, and in each case the state of things on which he acted was such as to make the impression of personal character distinct and permanent.'—Stubbs, Const. Hist. i. 446.

[4] Ben. Abb. i. 5. Et postea fecit rex omnes homines regni sui, scilicet comites, barones, milites, francos tenentes, et etiam villicanos, per singulos vice-comitatus, jurare, tactis sacrosanctis evangeliis, quod verum dicerent; scilicet, quid et quantum vicecomites et ballivi eorum de eis ceperint, et quid cum judicio et quid sine judicio, et pro quali forisfactura. A few only of the Sheriffs were reinstated, 'et ipsi,' adds the chronicler, 'postea multo crudeliores exstiterunt quam antea fuerunt.' *Id.*, *u. s.* The comprehensive instruc-

The aim of his policy through life appears to have been the consolidation and centralisation of the kingly power in his own hands, and the rounding off, as it were, of his great empire, extending from the Cheviots to the Pyrenees. He attempted, though with only partial success, to reduce the Welsh to obedience; Ireland, unfortunately for herself only imperfectly conquered, was annexed to the English crown; and Scotland acknowledged his superiority. Policy of Henry II.

The *two great Constitutional results of Henry's reign* were: (1) the reorganisation and full development of the Kingship as a monarchy at once feudal and national; and (2) the maintenance of the legal supremacy of the State over the National Church. In working out his policy, the King had to contend with two powerful opponents—(1) the feudal baronage, whose power and privileges it was necessary largely to curtail, and (2) the clergy, who, under the system of separate spiritual and temporal jurisdictions initiated by the Conqueror, had succeeded in obtaining a mischievous and even dangerous immunity from all the ordinary processes of law. Two great Constitutional results of Henry's reign.

Over the barons Henry was completely successful. The programme of administrative reform, which had been included in the terms of the pacification of Wallingford, was strictly carried out. The 'adulterine' castles were destroyed; the new earldoms extinguished; the alienated demesnes of the Crown resumed; the foreign mercenaries banished; the coinage was reformed.[1] With the aid of Administrative reforms.

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tions to the Commissioners, comprised in thirteen articles, are given in Sel. Chart. 141, from Bodl. MS., Rawlinson, C. 641. [It is stated in *The Antiquary* for Nov. 1889, that a portion of the original MS. of the Inquest of Sheriffs, which was not known to Bishop Stubbs to be in existence, has been identified by Mr. J. H. Round, M.A.—Ed.]

[1] Rob. de Monte, *s. a.* 1155. Rex Henricus coepit revocare in jus proprium urbes, castella, villas, quae ad coronam regni pertinebant, castella noviter facta destruendo, et expellendo de regno maxime Flandrenses, et deponendo quosdam imaginarios et pseudocomites quibus rex Stephanus omnia pene ad fiscum pertinentia minus caute distribuerat. For the new coinage cf. Ben. Abb. i. 263 [Henricus rex . . . fecit in Anglia novam monetam fieri, . . . vetus namque moneta corrupta fuit.—Ed.], *s. a.* 1180.

counsellors whose ability he had the discernment to detect,[1] he re-organised and extended the judicial and financial administration of the *Curia Regis* and Exchequer. He renewed the provincial visitations of Itinerant Justices, increased their number and assigned them regular circuits. This diffusion of Royal justice over the whole kingdom was a great step in its organisation. Another legal improvement in this reign was the institution of the Grand Assize, or trial by the recognition of a jury, which superseded the old modes of trial by battle and by compurgation.[2] The principle of recognition by a jury was extended to all descriptions of business, fiscal and legal. In conjunction with the visits of the Itinerant Justices, it exercised a very important influence in training the people for self-government.[3]

Itinerant Justices.

The Grand Assize.

By means of Henry's administrative reforms, not only did the mass of the people obtain the enjoyment of an orderly and legal security, but the feudal baronage, a source of danger to Crown and people alike, were kept in strict subordination, and the executive power taken out of their hands. After the Inquest of 1170, instead of bestowing the office of sheriff on the great barons, who had evinced a tendency to make it hereditary in their families, Henry gave it to lawyers and soldiers drawn from the ranks of the new official nobility. For the office of Chief Justiciar he selected the ablest laymen instead of ecclesiastics, thus

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[1] Henry's first ministers were 'the Earl of Leicester, Robert de Beaumont, Archbishop Theobald, who had been firmly attached to the interests of the Empress throughout the later years of the struggle, Bishop Henry of Winchester, and Nigel of Ely who represented the family and the official training of Roger of Salisbury, the justiciar of Henry I. In a subordinate capacity was Thomas Becket of London, the pupil of Theobald and future archbishop and martyr, and Richard de Lucy, who had charge of the castle of Windsor and the Tower of London at the peace, who had possibly acted as justiciar during the last year of Stephen, and who filled the office for the first twenty-five years of Henry's reign.'—Stubbs, Const. Hist. i. 449. De Lucy was succeeded as Justiciar in 1180 by the great lawyer Ranulf de Glanvill.

[2] [Bigelow, *Hist. Procedure in Eng.*, p. 175, *n.* 2, and p. 400, *n.* 1, on the strength of Coram Rege Roll, Mich., 9 Joh., No. 33 (A. 1. 40), memb. 8, which he prints in full at p. 400, suggests that the Magna Assisa was 'one of the reforms effected by virtue of the terms of the Peace of Wallingford.' —ED.]

[3] For a more detailed consideration of Henry's legal and administrative reforms, see *infra*, ch. v.

curbing the power of both bishops and barons. The power of the latter was still further, and permanently, diminished by the institution, on the occasion of the Toulouse war, of a commutation of personal military service for a money payment termed *Scutage*.[1] *Scutage*, 1159.

Thus, in addition to the fiscal and judicial, the military administration of the kingdom was now concentrated in the King's hands. In a fiscal point of view the King was enabled, by means of scutage, to increase his revenue by bringing the lands of the dignified ecclesiastics under contribution. Politically it rendered him independent of the military aid of his barons in foreign warfare, in which their place was supplied by hired mercenaries. At home he rendered himself equally independent of the feudatories, by reviving in the Assize of Arms, an ordinance issued in 1181, the ancient *fyrd*, or national militia.[2] *Assize of Arms*, 1181.

The effect of Henry's policy was greatly to augment the power of the Crown. But while maintaining a strong central government, he never aimed at despotic power. He appears to have been imbued with a sincere regard for Constitutional government of the Feudal type. He was continually calling his Great Council together. No public matter of importance was transacted, no law issued, without their consent and advice. And in this National Council all ranks of the landowners attended—archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders. The form and much of the spirit of national representation was thus maintained.

In his contest with Becket and the clergy, Henry was only partially successful. But though obliged to submit to personal humiliation and a seeming defeat, the principle for which he had contended—the supremacy of the Royal Contest with Becket and the clergy.

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[1] Rob. de Monte, *s. a.* 1159; Gervas. Dorob. c. 1381; Select Chart. 122, 123. 'A precedent was found in the ancient fyrdwite, the fine paid by the Anglo-Saxon warrior who failed to follow his king to the field. But instead of being a punishment it was now regarded as a privilege; those tenants of the crown who did not choose to go to war paid a tax of two marks on the knight's fee.'—Stubbs, Const. Hist. i. 456.

[2] Ben. Abb. i. 278; Hoveden, ii. 261; Select Chart. 127, 147.

jurisdiction over clergy and laymen alike—was practically, as well as theoretically vindicated.[1]

Constitutions of Clarendon, 1164.

The celebrated CONSTITUTIONS OF CLARENDON, sixteen in number, are in form a record and acknowledgment by the archbishops and bishops, in presence of the earls, barons, and other *proceres* of the kingdom, clerical and lay, of the customs ascertained by recognition to have regulated the relations of Church and State in the time of Henry I. The record is expressed as being made on account of the dissensions and discord which had arisen between the clergy and the King's justices and barons concerning the nature of these customs, and contains the distinct promise of the archbishops and bishops faithfully to observe them as therein defined.

The most important articles may be conveniently arranged in five groups:

Trial of clerks accused of crime.

1. All clerks accused of any crime were to be summoned in the first instance before the King's Justices, who should determine whether the cause ought to be tried in the secular or spiritual court. In the event of the cause being remitted to the spiritual court, a lay officer should be appointed by the King's Justices to watch the proceedings; and the accused, if found guilty, should not be protected by the Church (cap. iii.). All matters pertaining to the King's court should be terminated there; but causes which appeared to fall within the jurisdiction of the Ecclesiastical courts should be sent thither to be dealt with (cap. vii.). The distinction between the Civil and Ecclesiastical jurisdictions introduced by William the Conqueror was thus maintained.[2] But the King's court was first to decide the fact whether or not the accused was entitled to be tried in the spiritual court; the latter court then decided the fact of the guilt or innocence of such accused persons as were

[1] [On the conflicts between Church and State in England under Becket and Anselm, see *post*, Appendices.—ED.]

[2] [Pearson, *Hist. Eng. Early and Middle Ages*, 1867, i. 495, remarks that 'when William I. and Lanfranc concurred in a policy which dissolved the old union of the two bodies politic (Church and State) they had unavoidably placed them in a condition of suppressed antagonism.'—ED.]

remitted to it; and the King's court sentenced and punished the guilty.

All disputes concerning advowsons and presentations to livings, whether between laymen, or clerks, or laymen and clerks, were to be dealt with and terminated in the King's court (cap. i.).

Suits as to advowsons and presentations.

The King's court should have jurisdiction over all pleas of debt, whether involving a question of good faith (of which the Church claimed exclusive cognisance) or not (cap. xv.).

Pleas of debt.

In disputes between laymen and clerks as to land, the Chief Justice should decide, by the recognition of twelve lawful men, whether it was held by feudal or eleemosynary tenure (frankalmoign), and should refer the suit accordingly, unless both parties agreed on the same judge, to the lay or ecclesiastical tribunal (cap. ix.).

Suits between laymen and clerks as to land.

Laymen tried in the bishop's court were to have the benefit of Common Law rules of evidence.[1] If no one should be willing, or dare, to appear as accuser against a powerful delinquent, the sheriff, at the request of the bishop, should impanel and swear twelve lawful men of the vicinage to give true evidence (cap. vi.).

Trials of laymen for spiritual offences.

2. No tenant-in-chief of the King or officer of his household should be excommunicated, nor his lands put under interdict, without the previous consent of the King, or, in his absence from the kingdom, of his Justiciar (cap. vii.).

Excommunication of tenants-in-chief and officers of the King's household.

On the same principle, tenants of any of the King's cities, castles, boroughs, or demesne manors, refusing to appear when cited by the archdeacon or bishop to answer for any wrong falling within his lawful jurisdiction, might be placed under interdict, but not excommunicated until application had first been made for the intervention of the King's chief local officer (cap. x.).[2]

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[1] Laici non debent accusari nisi per certos et legales accusatores et testes. [c. vi.]

[2] [It is difficult to see what object was gained to the State by the distinction in cap. x., interdict and excommunication being equally ecclesiastical censures. That which struck the greater number, and among them probably the more innocent, viz., interdict, is allowed, while the King's personal sense of dignity

King to have custody of vacant sees, etc.

3. The custody of vacant archbishoprics, bishoprics, abbeys, and priories of Royal foundation, should be in the King's hand, and their revenues paid to him.

Mode of election to bishoprics and abbacies.

Election of a new incumbent should take place, in obedience to the King's writ, by the chief clergy of the church, assembled in the King's chapel, with the assent of the King, and with the advice of such beneficed clergymen as the King might summon for the purpose.

Homage and fealty of incumbent elect.

Before consecration, the incumbent elect should do homage and fealty to the King as his liege lord, of life, limb, and earthly honour, saving the rights of his order (cap. xii.).

Baronial duties of the prelates and other clergy holding *in capite*.

Archbishops, bishops, and all the beneficed clergy of the kingdom, holding of the King *in capite*, should answer for their baronies to the King's justices and officers, and follow and observe all Royal rights and customs; and, like the rest of the barons, ought to take part in the judgments of the King's court, except in cases involving loss of life or limb (cap. xi.).

Clergy not to quit the realm without the King's licence.

No archbishop, bishop, or beneficed clergyman should quit the realm without licence from the King. Those who were permitted to leave, should give pledge, if required, not to contrive any hurt to the King or kingdom during their absence.

Ecclesiastical appeals not to go further than the archbishop without the King's consent.

4. Appeals ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop. If the archbishop failed to do justice, resort should be had, in the last instance, to the King, so that by his order the controversy might be terminated *in the archbishop's court* and not proceed further (*i.e.* to the Pope), without the King's assent (cap. viii.).

Ordination of villeins.

5. Lastly, the sons of villeins (*rusticorum*) were not to be admitted to orders without the assent of the lord on whose land they were born (cap. xvi.).[1]

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is saved by the prohibition of the personal censure of excommunication of the tenants of Royal cities and manors.—ED.]

[1] See the Latin Text of the Constitutions in Lyttelton's Life of Henry II., iv. 182—185, and in Select Chart. 131—134.

This restriction on the ordination of villeins brings out the democratic element which, in a certain way, the Church of the Middle Ages possessed. Not that the mediæval church was really democratic, for its system of government culminated in the Papacy, and the Papacy had become the key-stone of a great arch of despotism. But it was only through the portals of the Church that the low-born and landless man, however great his intellectual ability, could hope to attain to dignity and power. The intention of the King and barons, in this article of the Constitutions of Clarendon, probably went no further than to protect the legal property which every feudal lord had in the services of his villeins. But its practical effect was undoubtedly still further to depress the lowest class of the population. A similar prohibition is contained in the Assize of Clarendon, issued by Henry in 1166; and more than two hundred years afterwards, in the fifteenth year of Richard II., we find the Commons House of Parliament petitioning that villeins might not be allowed to put their children to school in order to advance them by the Church, 'and this for the honour of the freemen of the kingdom.' Under Richard II. it is not so much the feudal and proprietary as the anti-democratic and caste feeling which is manifested.[1]

RICHARD I. 1189-1199.

The reign of RICHARD I. belongs not so much to the history of England as to the history of Christendom. He was the 'creation and impersonation of his own age,'[2] and occupied the central place in the history of his times.

An absentee king.

With the exception of about four months immediately following his coronation, and the two months which he spent in England in 1194 after his release from captivity,

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[1] Rot. Parl. 15 Rich. II. 294; Hallam, Middle Ages, iii. 181. [Pearson, *Hist. Eng. Early and Middle Ages*, i. 499, argues strongly against c. xvi. as 'shutting out the poor from their one refuge upon earth.' M. Esmein, *Rev. Gén. du Droit*, 1885, p. 301, *seq.*, cites the canons of the Council of Orléans, 538, against the ordination of serfs not previously freed. An earlier Council of Orleans, 511, convoked by Clovis, had decreed that a bishop ordaining serfs without the consent of their lord should pay him an indemnity, but that the serfs so ordained should remain ordained. Guizot, *Civ. en France*, iii. 305.—ED.]

[2] Stubbs, *Itinerarium Ricardi Primi*, Rolls Series [Int. xi.].

Richard was absent from his kingdom during the whole ten years of his reign. By birth, education, and sympathies essentially a foreigner, he seems to have regarded England merely as an appanage to his continental possessions, and a profitable source of revenue. It was the strong administrative system established under his father, by which the power of the Crown was so largely augmented, that rendered it possible for Richard thus to govern as an absentee king. To support his expedition to Palestine, to pay his ransom from captivity, and to carry on his wars in France, every known source of taxation was exhausted. Public offices and dignities were openly sold to the highest bidder; the demesne lands of the Crown were first sold and then, after a time, forcibly resumed; all the feudal dues, including the recently introduced Scutage, were rigorously exacted; the old Danegeld, under the thin disguise of a 'carucage,' was revived in a more stringent form; not only land, but personal property, which had for the first time been subjected to taxation in the Saladin tithe granted to Henry II. in 1188, was laid under a heavy impost; the gold and silver of the churches were seized; and the Cistercian monks compelled to compound for all their wool.[1] These systematic and oppressive exactions appear to have been borne by the nation with remarkable patience. The rising of the populace of London, under William with the Beard, 'quidam legis peritus,' was not so much a resistance to taxation as to its unjust assessment, because the rich citizens 'sparing their own purses, willed that the poor should pay the whole.'[2] The only real

Excessive taxation.

Ways of raising money.

Popular rising under William with the Beard, or Fitz-Osbert.

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[1] Et omnia erant ei venalia, scilicet potestates, dominationes, comitatus, vicecomitatus, castella, villæ, praedia, et cetera iis similia. Bened. Abb. ii. 90. For the various modes of taxation, see Rog. Hoveden, iii. 210, 240, *s. a.* 1193—4; Select Chart. 243, 244, 246.

[2] Rog. Hoveden, iv. 5, *s. a.* 1196. Eodem anno orta est dissensio inter cives Londoniarum. Frequentius enim solito propter regis captionem et alia accidentia imponebantur eis auxilia non modica, et divites propriis parcentes marsupiis volebant ut pauperes solverent universa. Quod cum quidam legis peritus, videlicet Willelmus cum barba, filius Osberti, videret, zelo justitiae et aequitatis accensus factus est pauperum advocatus, volens quod unusquisque tam dives quam pauper *secundum mobilia et facultates suas* daret ad universa civi-

opposition proceeded from the clergy. In 1198 the regular clergy refused to pay the carucage, or tax of five shillings imposed on each carucate (or hundred acres) of land. The King immediately issued a proclamation directing that on the one hand no layman should be liable to make satisfaction for an injury committed against a clerk, and, on the other, that every clerk injuring a layman should be forthwith compelled to give redress.[1] This amounted to virtual outlawry, and the monastic clergy were forced to submit. A more important and successful stand was made in the same year by the Bishops Hugh of Lincoln and Herbert of Salisbury. In a council of the barons, summoned at Oxford by the Justiciar, Archbishop Hubert Walter, to consider the King's demand for an aid of three hundred knights, each to receive three shillings a day, and to serve with him for a year against Philip of France, the two bishops alone had the courage to refuse; alleging that the lands of their sees were liable for military service within the kingdom only and not abroad.[2] The opposition was successful; the King's demand was withdrawn: and shortly afterwards the Justiciar resigned.[3]

Constitutional opposition of the clergy:

[successful].

During the all but continuous absence of Richard, the

Administration of Richard's four successive Justiciars.

tatis negotia. The talliage was assessed as a poll-tax equally on all the citizens rich and poor. Fitz-Osbert wished it to be assessed in proportion to the property of each citizen.

[1] Rog. Hoveden, iv. 66; Select Chart. 250.

[2] Scio equidem, said St. Hugh of Lincoln, ad militare servitium domino regi, sed in hac terra solummodo, exhibendum, Lincolniensem ecclesiam teneri; extra metas vero Angliae nil tale ab ea deberi. Unde mihi consultius arbitror ad natale solum repedare, et eremum more solito incolere, quam hic pontificatum gerere et ecclesiam mihi commissam, antiquas immunitates perdendo, insolitis angariis subjugare.—Vita Magna S. Hugonis, p. 248; Select Chart. 247.

[3] 'This event is a landmark of constitutional history: for the second time a constitutional opposition to a royal demand for money is made, and made successfully. It would perhaps be too great an anticipation of modern usages to suppose that the resignation of the minister was caused by his defeat.'—Stubbs, Const. Hist. i. 509. 'The *first case* of any opposition to the king's will in the matter of taxation which is *recorded* in our national history,' was the refusal of Becket to agree to Henry II.'s wishes with reference to the Danegeld in 1163. This was the commencement of the quarrel between the King and the Archbishop; and as 'Danegeld appears for the last time under that name in the accounts of the year,' the opposition 'would seem to have been, formally at least, successful.'—*Ibid.* 463.

(i.) Longchamp.

administration of the kingdom was carried on by four successive Justiciars who acted as viceroys. (1) William Longchamp, Bishop of Ely, a Norman of [servile] birth, was both Justiciar and Chancellor. As a parvenu he excited the jealousy of the barons, and by his vigorous assertion of the Royal rights raised up a strong opposition headed by Earl John, who was ever plotting against his brother's government. The struggle ended in the deposition of Longchamp from the Justiciarship by a Great Council of the bishops, earls, and barons of England, and the citizens of London, assembled at St. Paul's by Earl John, and apparently acting in concert with William of Coutances, Archbishop of Rouen, whom the King had sent over from Messina some months previously with a secret appointment to the office of Justiciar, to be produced only if circumstances should require it.[1] This proceeding has been characterised as 'the earliest authority for a leading principle of our constitution, the responsibility of ministers to Parliament.'[2] But this view seems to invest the action of the Council of St. Paul's with too great importance. It can at most be regarded as a rude anticipation, by an irregularly constituted assembly acting as if it represented the nation, of that Constitutional control over ministers of the Crown which the regular National Council was later on to claim and obtain. (2) The assembly which deposed Longchamp recognised the Archbishop of Rouen as his successor. At the close of the year 1193, the Archbishop of Rouen gave place to (3) Hubert Walter, Archbishop of Canterbury, and a nephew of the celebrated Ranulf de Glanvill; and on the resignation of Hubert Walter in 1198, Geoffrey Fitz-Peter, Earl of Essex, the fourth and last of Richard's Justiciars, entered into office.

His deposition, 1191.

(ii.) William of Coutances.

(iii.) Hubert Walter.

(iv.) Geoffrey Fitz-Peter.

Under the rule of each of the Justiciars, but more especially of Hubert Walter and his successor, Geoffrey Fitz-

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[1] Bened. Abb. [si cancellarius stultum quid fecerit quod esset in detrimentum regis et regni.—ED.] ii. 213, *s. a.* 1191; Sel. Chart. 244.

[2] Hallam, Middle Ages, ii. [322].

Peter, the administrative system established by Henry II. was maintained and considerably developed. By the extensive application of the principle of representation to the assessment of the taxes on both real and personal property, the people were gradually educated for self-government. In the year 1194, the principle of election in the appointment of County officers was introduced. Coroners, three knights and a clergyman, were ordered to be elected in every county, to hold pleas of the Crown.[1] The advance made by the boroughs towards independence, through the charters which, as a means of raising money, were extensively sold to them, is also an important feature of this reign. In some instances the privileges granted were assimilated to those of the citizens of London, which served as a model for the provincial towns, and included the right of electing the town-reeve.[2] On the occasion of Longchamp's deposition, in which, as we have seen, the citizens of London concurred, they secured a formal recognition, by the Justiciar and barons, of their existence as a '*communa*,' the exact meaning of which is not quite clear, but which was certainly a near approach to what is understood by a 'corporation.'[3] In connexion, doubtless, with this establishment of the *communa*, the Mayor now appears for the first time.

Election of county Coroners.

Charters granted to boroughs.

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[1] Praeterea in quolibet comitatu eligantur tres milites et unus clericus custodes placitorum coronae.—*Capitula placitorum Coronae Regis*, cap. 20; Select Chart. 252.

[2] Has praedictas consuetudines eis concessimus, et omnes alias libertates et liberas consuetudines quas habuerunt vel habent cives nostri Londoniarum quando meliores vel liberiores habuerint, secundum libertates Londoniarum et leges civitatis Lincolniae. . . . Et cives Lincolniae faciant praepositum quem voluerint de se per annum, qui sit idoneus nobis et eis.—From Charter of Richard I. to Lincoln, 1194, in Rymer, i. 52, and Select Chart. 258.

[3] Bened. Abb. ii. 214, *s. a.* 1191; Select Chart. 244. No boroughs were incorporated as municipal corporations, in the modern sense of the term, till the reign of Henry VI.—Merewether & Stephens on Boroughs, vol. i., Introd. [*Communa* is another form of *Communitas*, and is the origin of the French word *Commune*. Guizot translates *Communitas* by *Commune*, in his *Civilisation en France*. The words of Benedictus Abbas, *loc. cit.*, Johannes comes . . . et archiepiscopus Rothomagensis et omnes episcopi, comites et barones regni qui aderant, concesserunt civibus Londoniarum communam suam, read as though relating to a grant rather than a confirmation, and this may have been its formal aspect.—Ed.]

Summary.

On the whole, the reign of Richard, through no merit however of his own, was beneficial to the liberties of the people. They became accustomed to the rule of Law as opposed to the rule of force. Even the unexampled taxation was levied with the appearance of legal formality. The immense sums raised are a proof that the kingdom had rapidly advanced in wealth during the preceding reign. The baronage, which had been severely repressed under Henry II., became at once more orderly and less inclined than formerly to submit to the caprice of the sovereign, to whose personal interference they had become unaccustomed. The fusion of the two races, nearly accomplished under Henry II., was silently worked out under Richard; and in the following reign we shall find the barons and people claiming for themselves against the Crown the common liberties of Englishmen.

CHAPTER IV.

MAGNA CHARTA.

THREE great political documents, in the nature of fundamental compacts between the Crown and the Nation, stand out as prominent landmarks in English Constitutional history. Magna Charta, the Petition of Right, and the Bill of Rights, constitute, in the words of Lord Chatham, 'the Bible of the English Constitution.' In each of these documents, whether it be of the 13th or of the 17th century, is observable the common characteristic of professing to introduce nothing new. Each professed to assert rights and liberties which were already old, and sought to redress grievances which were for the most part themselves innovations upon the ancient liberties of the people. In its practical combination of conservative instincts with liberal aspirations, in its power of progressive development and self-adaptation to the changing political and social wants of each successive generation, have always lain the peculiar excellence, and at the same time the surest safeguard, of our Constitution.[1]

The three great fundamental compacts between the Crown and the Nation: Magna Charta, Petition of Right, Bill of Rights.

The Great Charter of Liberties was the outcome of a movement of all the freemen of the realm, led by their

The Great Charter, an act of the whole people under the

[1] 'By far the greatest portions of the written or statute laws of England consist of the declaration, the re-assertion, repetition, or the re-enactment, of some older law or laws, either customary or written, with additions or modifications. The new building has been raised upon the old ground-work: the institutions of one age have always been modelled and formed from those of the preceding, and their lineal descent has never been interrupted or disturbed.'—Palgrave, Eng. Commonwealth, i. 6.

leadership of the barons. Unselfishness of the barons.

natural leaders the barons.[1] Far from being a 'mere piece of class legislation,' extorted by the barons alone for their own special interests, it is in itself a noble and remarkable proof of the sympathy and union then existing between the aristocracy and all classes of the commonalty. At least one-third of its provisions relate to promises and guarantees on behalf of the people in general, as contradistinguished from the baronage. But one fact is specially significant. The important and comprehensive clause (60), by which the customs and liberties granted to the King's tenants-in-chief, are expressly extended to every sub-tenant in the kingdom, did not, like the similar provision in the Charter of Henry I., emanate from the King, but was spontaneously included by the barons themselves in the articles presented to John as a summary of their demands.[2]

The Charter a treaty of peace between the King and his people in arms.

The eminently moderate, practical, and conservative character of the barons' demands is especially noticeable. Magna Charta was in fact a treaty of peace between the King and his people in arms; yet their ancient rights and liberties, the acknowledgment of which had been extorted from the King, were expressed to flow from his grant.

Its moderate, practical and conservative character.

There is nothing theoretical or revolutionary in the Charter: no declaration of abstract principles of government, but merely a practical assertion of rights as between the

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[1] [Stubbs, Const. Hist. i. 532, calls the Great Charter 'the first great public act of the nation after it has realised its own identity.' M. Glasson, *Hist. du Dr. et des Inst. de l'Angl.*, iii. 52, says, 'la Grande Charte est un Contrat, mais qui se rapproche du traité passé entre deux nations,' and M. Boutmy, *Les Sources de la Const. Angl.*, in *Nouv. Rev. Hist. de Droit Fr. et Etr.*, for 1878, calls it a 'pacte;' not exactly a treaty (traité), because not made between two sovereign powers or two nations; nor yet a statute (loi), because then it would bear the note of irregularity or force; but a compromise (compromis ou pacte). In so far as it resembles anything in French history, M. Boutmy likens it to the Treaty of Amboise, the Peace of St. Germain, and all those conventions during the French wars of religion, which gave guarantees to the Huguenot party, and almost made of them 'a nation within the nation.'—ED.]

[2] Articles of the Barons, c. 48, Blackstone's Charters, pp. 1—9, and Select Chart. p. 286; Magna Charta, c. 60, *infra*, p. 127; Stubbs, Const. Hist. i. 530. [M. Glasson (*ubi supra*) draws attention to the strongly practical character of Magna Charta, and says that every article gives proof of an intimate acquaintance with the administration of the State, and with the evils of which the nation had to complain, as well as with the remedies which needed to be applied.—ED.]

Crown and the subject, and, as a natural corollary under a system of feudal tenures, between mesne lords and their sub-vassals. Its language is 'simple, brief, general without being abstract, and expressed in terms of authority, not of argument, yet commonly so reasonable as to carry with it the intrinsic evidence of its own fitness. It was understood by the simplest of the unlettered age for whom it was intended. It was remembered by them, and, although they did not perceive the extensive consequences which might be derived from it, their feelings were, however unconsciously, elevated by its generality and grandeur.' [1]

It is based on the charter of Henry I. and the law of Edward the Confessor.

Sir Edward Coke has remarked that the Charter was for the most part 'declaratory of the principal grounds of the fundamental laws of England.' [2] It was in fact founded on precedent. Its bases were the Charter of Henry I., and the law as administered in the time of good King Edward. The law of the Confessor had been renewed by William the Conqueror, and again expressly confirmed by Henry I. in his Charter. A copy of this Charter, produced to the barons by the Archbishop, Stephen Langton, in 1213, formed the groundwork of their demands. In this way the Great Charter may be regarded as the lineal representative of the laws of King Edward, which from this time ceased to form the popular cry of good government.[3]

The key-stone of English liberty.

The importance of Magna Charta can hardly be exaggerated. It has been well characterised by Hallam as the 'key-stone of English liberty,' to which all that has since been added is 'little more than confirmation or commentary.' And Sir James Mackintosh has insisted upon

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[1] Sir J. Mackintosh, Hist. of Eng. i. 220—21.

[2] Coke, 2nd Inst. Proeme.

[3] According to Matthew Paris [*Chron. Maj.*, ed. Luard, ii. 552.—Ed.], Archbishop Langton, at the meeting at St. Paul's, on the 25th August, 1213, assured the barons that before absolving John from the excommunication he had compelled him to swear to restore the laws of King Edward: 'Audistis, inquit, quomodo tempore quo apud Wintoniam regem absolvi, ipsum jurare compulerim quod leges iniquas destrueret, et leges bonas, videlicet leges regis Eadwardi, revocaret et in regno faceret ab omnibus observari. Inventa est quoque nunc carta quædam Henrici primi regis Angliae, per quam, si volueritis, libertates diu amissas poteritis ad statum pristinum revocare.'

the noticeable fact that the consequences of its principles were but slowly and gradually evolved, as circumstances required, during the five succeeding centuries.[1]

Events of John's reign which led to the granting of the Charter.

Separation of Normandy from England, 1203.

Several causes worked together to bring about the state of affairs which compelled John to grant the Great Charter. Foremost among these was the fortunate loss of Normandy.[2] The barons, confined within the limits of England, concentrated their attention upon its affairs. They became thoroughly English in interests and sympathies, and united with the people against the tyranny of the King.[3] Moreover, a great part of the baronage now consisted of the new Ministerial families raised up by the policy of Henry I. and Henry II. These were far less closely connected with Normandy than the baronage of the Conquest, and their sympathies were National rather than Feudal.

Decay of Feudalism.

The loss of Normandy was itself in a great measure due to the decay of Feudalism, the result of Henry II.'s policy. John, who was not altogether destitute of energy

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[1] Mackintosh, Hist. Eng. i. 221.

[2] 'The talents and even the virtues of England's first six French kings were a curse to her. The follies and vices of the seventh were her salvation. . . . . John was driven from Normandy. The Norman nobles were compelled to make their election between the island and the continent. Shut up by the sea with the people whom they had hitherto oppressed and despised, they gradually came to regard England as their country, and the English as their countrymen. The two races, so long hostile, soon found that they had common interests and common enemies. Both were alike aggrieved by the tyranny of a bad king. Both were alike indignant at the favour shown by the court to the natives of Poitou and Aquitaine. The great-grandsons of those who had fought under William and the great-grandsons of those who had fought under Harold began to draw near to each other in friendship; and the first pledge of reconciliation was the Great Charter, won by their united exertions and framed for their common benefit.'—Macaulay, Hist. Eng. i. 15. The Channel Islands—the only Norman territory not lost—still continue attached, as a separate dependency, to the English crown. [In a Paper on the *Laws, Constitutions, and Language of the Channel Islands,* recently read before the Royal Society of Literature, by Mr. W. W. Marshall, B.C.L., the Islands were considered to be a semi-sovereign state. Their position, in fact, resembles that of the Isle of Man at the present day, and of the Orkney and Shetland Islands under their Norse, and, to a lesser degree, under their Scottish Earls.—ED.]

[3] [Green, *Hist. of the English People,* 1878, i. 198, says, 'It was with a new English people that John found himself face to face,' and also points out how the rise of the Universities was synchronous with this welding together of hitherto jarring elements, which produced a nation 'quickened with a new life and throbbing with a new energy.'—ED.]

and courage, made some efforts to recover Normandy, but the barons, especially in the north of England, where the possessions of the new families chiefly lay, refused to follow the King, alleging that they were not bound to military service abroad.

The barons refuse to follow the King on foreign service

Intimately connected with this refusal, and with the exaction of the Charter was the personal character of the King, which inspired utter distrust and aversion in all classes of his subjects. In disposition and character John was an oriental despot, a tyrant of the worst sort. Under Henry II. and the Ministers of Richard I., the nation had become accustomed to the rule of Law; John set at defiance all laws, human and divine.[1] Supported in his tyranny by bands of foreign mercenaries, he not only taxed and fined his subjects of every degree with an open disregard of all legal restraints,[2] but was guilty of acts of cruelty rivalling those of Nero.[3] The Church, the baronage and the people, united by common oppression in a common hatred of the tyrant, were compelled to make a stand not so much for Constitutional government as for personal liberty.

Effects of the King's personal character.

Church, baronage, and people united against the King.

In his struggle with the Papacy, arising out of the disputed election of a successor to Hubert Walter in the archiepiscopal see of Canterbury, John had to deal with a man of consummate ability, who had carried to the highest point, both in theory and practice, the doctrine of the paramount suzerainty of the Pope. As a matter of fact,

Struggle with the Papacy.

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[1] Quosdam absque judicio parium suorum exhaeredebat, nonnullus morte durissimâ condemnabat. Uxores filiasque eorum violabat; et ita pro lege ei erat tyrannica voluntas.—Annal. Waverl. (ed. Luard), p. 282.

[2] *S.a.* 1205. Rex cepit de comitibus, baronibus, militibus, et viris religiosis *pecuniam infinitam.*—Matt. Paris [*Chron. Maj.*, ed. Luard, ii. 490.—Ed.], *s.a.* 1210. *Inaestimabilem et incomparabilem* fecit pecuniae numeratae *exactionem*, nullis viris clericis vel laicis, nulli religioni cujuscunque ordinis parcens.—Ann. Waverl., p. 264.

[3] See his treatment of Matilda, the wife of William de Braose, and of their son and daughter-in-law, in Matt. Paris [*Chron. Maj.*] (ed. Luard), ii. [531], Roger of Wendover, Chron. iii. 235, and Ann. Waverl. p. 265; and of Geoffrey of Norwich [called by Paris his faithful and prudent clerk, who, in castro de Notingham pœna excogitata usque mortem torquetur]. (Matt. Paris [*Chron. Maj.* ed. Luard], ii. [537]).

Ecclesiastical elections only nominally free.

freedom of election to the higher ecclesiastical benefices, however it might accord with canonical requirements, had never been practically recognised by the English kings. Prior to the Norman Conquest, the appointments had been made in the Witenagemot, and afterwards by the King in the *Curia Regis* or Great Council of the Realm. The political power of the Bishops, of the Archbishop of Canterbury especially, was so great in early and mediæval times, that it would seem to have been a State necessity that their nomination should rest with the supreme Civil authority. Although the form of election was conceded by Henry I., the process, under what was subsequently termed a *congé d'élire*, was free only in name. At this time, whether from the King's weakness, or from the spread of high ecclesiastical doctrines throughout Europe under the powerful and successful leadership of Innocent III., the monastic chapter of Christ Church, Canterbury, attempted to assert their right of election, and chose their sub-prior. In the meantime the King directed the suffragan bishops to elect John de Grey, Bishop of Norwich. The case was carried before Innocent, who set both elections aside and himself nominated Stephen Langton, an Englishman of the highest character and great reputation for learning.[1] In this proceeding the Pope distinctly infringed upon the rights of the King, of the Chapter of Canterbury, and of the English nation ; but fortunately for the [realm], he made as great a mistake in the person of his nominee as Henry II. found he had made in nominating Becket.

Double election to the see of Canterbury.

Pope Innocent III. sets both elections aside and consecrates Stephen Langton.

John refuses to receive the Pope's nominee.

The Interdict.

John determined not to submit, and refused to receive Langton as Archbishop. The Pope then (1208) placed the kingdom under Interdict (which suspended the whole religious life of the nation). The people were made to suffer in order that they might put pressure on the King. John, not proving amenable to vicarious punishment, was

[1] The claim of the bishops to share in the election of the archbishops was enforced on several occasions during the 12th century, but after its rejection by Innocent III. was never advanced again. Stubbs, Const. Hist. iii. 305.

formally excommunicated (1209), and ultimately (in 1212) deposed.

Excommunication.

Deposition.

Threatened by Philip of France, whom the Pope had empowered and directed to take possession of the forfeited Kingdom of England, and feeling no reliance on the support of his alienated people, John at length gave in. From the extreme of arrogance and violence he now passed to the extreme of abject submission. He not only accepted Langton as Archbishop, and promised restitution of the money extorted from the Church, but surrendered his Kingdom to Pandulf, the Pope's [envoy], receiving it back as a fief of the Holy See, subject to the annual tribute of one thousand marks.[1] A few months afterwards, the act of submission was renewed to Nicholas, Bishop of Tusculum, with the actual performance of liege homage on the part of the King.[2] This submission was undoubtedly a disgrace, although not quite to the same extent as it would be now. It was, however, a startling falling off from the position which Henry II. had occupied, that one of his sons should do homage to the Emperor and another to the Pope.

John submits.

Surrenders his kingdom to the Pope. May 15, 1213.

The surrender of the temporal and spiritual independence of the Kingdom completed the alienation of the people from the King, whose misgovernment had brought on this national humiliation. On the other hand, the Pope now, having secured submission, changed his tactics, and supported the tyranny of his vassal. The barons determined upon resistance, and the National Church, headed

The struggle with the barons.

[1] See the concession of the kingdom to the Pope, and the form of oath of fealty in Rymer, i. 111, and Select Chart. 276. The 1000 marks were apportioned, 700 for England and 300 for Ireland. [Similar homage, but even more striking in its accompaniments, had been done, in 1204, by Peter of Arragon for the Kingdom of Arragon, as recorded in De Cherrier, *Hist. de la Lutte des Papes et des Empereurs*, ii. p. 528, Pièces Justif., i. Peter was first anointed and crowned at S. Pancrazio in Trastevere, by Innocent III., and then went to St. Peter's, and laid down his crown and kingdom at the shrine of the Apostles, as an offering to the Pope and the Roman Church, and by charter, deposited on the High Altar, confirmed the said offering, and laid a yearly tax on his kingdom of 250 'massunetines' for ever. In Peter's case a double homage was rendered, the first at the coronation, and the second at the solemn oblation at St. Peter's. Homage was done for Man, 1219.—Ed.]

[2] Ann. Waverl. 277, 278; Select Chart. 269.

by Archbishop Langton, gave the weight of its influence to the patriotic side.

It began in July, 1213, by their refusing foreign service.

It may be convenient briefly to notice the most important events which immediately led up to the grant of the Charter.[1] The open quarrel with the barons began in July, 1213, with the refusal of the northern nobility to follow John to France. While the King was vowing vengeance against his recalcitrant vassals, two important Councils of the Bishops and Barons were held, the first at St. Alban's, on August 4th, the second at St. Paul's, London, on August 25th. They were summoned ostensibly for the purpose of assessing the compensation promised to the Church; but the Justiciar, Geoffrey Fitz-Peter, and Archbishop Langton seized the opportunity of introducing a discussion on the King's general misgovernment. The half-forgotten charter of Henry I., having been referred to generally at St. Alban's as the standard of the people's liberties, was at St. Paul's produced by the Archbishop, and adopted as the basis of the barons' demands.

Councils at St. Alban's Aug. 4; and at St. Paul's Aug. 25.

Charter of Henry I. produced.

Importance of the *Council of St. Alban's* as the *first national representative assembly.*

The assembly at St. Alban's has a special importance of its own, as the first historical instance of the summons of representatives to a National Council. It was attended not only by the Bishops and Barons, but by the representative reeve and four men from each township on the Royal demesne. It is something more than a mere coincidence that to this National Council, in which the element of direct representation of the people, long familiar in the folkmoot of the shire, appears for the first time, were presented the first outlines of the reforms subsequently elaborated in the Articles of the Barons, and promulgated in the Great Charter.[2]

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[1] For a more detailed statement, see Blackstone, Int. to the Charters, and Stubbs, Const. Hist. i. 524—530.

[2] Stubbs, Const. Hist. i. 527. 'The action of this council is the first hesitating and tentative step towards that great act in which Church, baronage, and people made their constitutional compact with the king, and their first sensible realisation of their corporate unity and the unity of their rights and interests.'

During the greater part of the year 1214, John was absent on the Continent, whence he returned in October. In the meantime, the barons met at Bury St. Edmund's, and entered into a confederacy, binding them, if the King would not acknowledge the rights which they claimed, to withdraw their fealty and make war upon him until by a sealed charter he should confirm the laws and liberties of the people.[1]

1214, the King goes abroad till October.

Confederacy of the barons at Bury St. Edmund's.

On January 6th, 1215, the barons in arms presented their demands to the King at the Temple, and, at his urgent request, conceded a respite until after Easter, in order that he might have time for consideration.[2]

They present their demands to the King at the Temple, Jan. 6, 1215.

In this interval John did all he could to break up the combination against him. He granted a separate charter to the Church,[3] giving freedom of election of bishops and abbots; he ordered the sheriffs to administer the oath of allegiance and fealty to the freemen of every shire; he assumed the Cross, in order to gain the special protection of the Church as a crusader; and he attempted to detach the barons by offering them special terms. But the National party continued firm and united. The barons, strengthened by numerous adhesions since the Councils of St. Alban's and St. Paul's, assembled in arms at Stamford; and when the stipulated time had expired without an answer from the King, marched under the leadership of Robert Fitz-Walter, 'Marshal of the army of God and of the Holy Church in England,' to Brackley, in Northamptonshire.

John attempts to break up the combination against him; but without success.

The barons assemble in arms at Stamford and march to London.

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[1] Itaque convenerunt universi [comites et barones Angliae] ad ecclesiam Sancti Eadmundi, et incipientibus majoribus juraverunt super majus altare, quod si rex leges et libertates jam dictas concedere diffugeret, ipsi ei werram tam diu moverent ut ab ejus fidelitate se subtraherent, donec eis [per] cartam sigillo suo munitam confirmaret omnia quae petebant. Matt. Paris [*Chron. Maj.*, ed. Luard, ii. 583].

[2] Deinde cum festinatione [rex] Londonias veniens, apud Novum Templum hospitio sese recepit. Venientesque ad regem ibi supradicti magnates, in lascivo satis apparatu militari, petierunt quasdam libertates et leges regis Eadwardi cum aliis libertatibus, sibi et regno Angliae et ecclesiae Anglicanae concessis, confirmari, prout in carta regis Henrici primi et legibus praedictis asscriptae continentur . . Audiens autem rex . . postulabat inducias usque ad clausum Pascha. Matt. Paris [*Chron. Maj.*, ed. Luard. ii. 584].

[3] First granted Nov. 21st, 1214; re-issued Jan. 21st following.

Here the King sent to ask their demands, but when these were submitted to him, peremptorily refused to grant them. The Barons now continued their march to London, which they entered on the 24th May, amidst the acclamations of the citizens. The support of the Londoners seems to have decided the contest. The small, but by no means unimportant, section of the baronage which had hitherto remained faithful to the King, now went over to the confederacy, and with them most of the officials of the *Curia Regis* and Exchequer and even of the King's household.[1]

The support of the Londoners decides the contest.

Deserted by all but a few personal adherents, chiefly of foreign extraction, and utterly incapable of further resistance, John accepted the articles of the Barons, which were embodied in the Great Charter at Runnymede, on the 15th of June, 1215.

John, deserted by all but a few personal adherents, grants the Charter.

ANALYSIS AND SUMMARY OF THE CHARTER.

Magna Charta contains, in addition to the preamble, sixty-three clauses inserted without much regard to orderly arrangement. Its chief provisions may be conveniently grouped and summarised as follows:

The following text of John's Charter in the original Latin accords with the copy in Stubbs' Select Charters (pp. 288-297), except that the clauses and sentences omitted in Henry III.'s re-issues have been placed within brackets.

[JOHANNES Dei gratia Rex Angliae, Dominus Hyberniae, Dux Normanniae et Aquitanniae, Comes Andegaviae, archiepiscopis, episcopis, abbatibus, comitibus, baronibus, justiciariis, forestariis, vicecomitibus, praepositis, ministris et omnibus ballivis et fidelibus suis salutem. Sciatis nos intuitu Dei et pro salute animae nostrae et omnium antecessorum et haeredum nostrorum, ad honorem Dei et exaltationem sanctae ecclesiae, et emendationem regni nostri, per consilium venerabilium patrum nostrorum, *Stephani Cantuariensis* archiepiscopi totius Angliae primatis et sanctae Romanae ecclesiae

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[1] Blackstone, Introduction to the Charters.

Commencing with the declaration that the Church of England shall be free ('quod Anglicana ecclesia libera sit') with all her rights and liberties inviolate, and expressly confirming the freedom of election which he had already granted by separate charter, John grants to all the freemen of the kingdom ('words,' remarks Sir Edward Coke, 'which extend also to villeins, for they are accounted free against all men, saving against the lords'), the underwritten liberties: Clause 1. Liberties of the Church.

I.—*Feudal Obligations.*

2, 3. The heir (if of age) shall pay only 'the ancient relief'—viz., in the case of an earl or baron, 100*l.*; of a knight, 100*s.*; of one holding less than a knight's fee, less in proportion. A minor, who is in ward, shall have his inheritance, on coming of age, without relief or fine. *Reliefs.*

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cardinalis, *Henrici Dublinensis* archiepiscopi, *Willelmi Londoniensis*, *Petri Wintoniensis*, *Joscelini Bathoniensis et Glastoniensis*, *Hugonis Lincolniensis*, *Walteri Wygornensis*, *Willelmi Coventrensis*, et *Benedicti Roffensis* episcoporum; magistri *Pandulfi* domini papae subdiaconi et familiaris, fratris *Eymerici* magistri militiae templi in Anglia; et nobilium virorum, *Willelmi Mariscalli comitis Penbrok*, *Willelmi comitis Saresberiae*, *Willelmi comitis Warenniae*, *Willelmi comitis Arundelliae*, *Alani de Galweya* constabularii Scottiae, *Warini filii Geroldi*, *Petri filii Hereberti*, *Huberti de Burgo* senescalli Pictaviae, *Hugonis de Nevilla*, *Mathei filii Hereberti*, *Thomae Basset*, *Alani Basset*, *Philippi de Albiniaco*, *Roberti de Roppelay*, *Johannis Mariscalli*, *Johannis filii Hugonis*, et aliorum fidelium nostrorum.]

1. In primis concessisse Deo et hac praesenti carta nostra confirmasse, pro nobis et haeredibus nostris in perpetuum, quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illaesas; [et ita volumus observari; quod apparet ex eo quod libertatem electionum, quae maxima et magis necessaria reputatur ecclesiae Anglicanae, mera et spontanea voluntate, ante discordiam inter nos et barones nostros motam, concessimus et carta nostra confirmavimus, et eam optinuimus a domino papa Innocentio tertio confirmari; quam et nos observabimus et ab haeredibus nostris in perpetuum bona fide volumus observari.] Concessimus etiam omnibus liberis hominibus regni nostri, pro

By the charter of Henry I. reliefs were to be 'justa et legitima.' The sum is now defined. (*Supra*, pp. 65, 81.)

Wardships. 4, 5. Guardians shall take only reasonable fruits and profits, without destruction or waste; and shall keep up the estate in proper condition during the wardship.

By Henry I.'s charter, the widow or next of kin was to be the guardian. The Assize of Northampton (1176), directed that the lord of the fee should have the wardship. Magna Charta remedies the *abuses* of wardship. (*Supra*, pp. 65, 81.)

Marriage. 6. Heirs shall be married without disparagement, their near blood relations having notice beforehand.

Henry I.'s charter bound the King to consult his baronage as to the marriage of heiresses. In the Articles of the Barons 'haeredes' were to be married '*per consilium* propinquorum de consanguinitate sua.' In the Charter itself this is softened down to barely giving *notice* to the relations; and even this requirement was omitted in Henry III.'s re-issues.

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nobis et haeredibus nostris in perpetuum, omnes libertates subscriptas, habendas et tenendas, eis et haeredibus suis, de nobis et haeredibus nostris.

2. Si quis comitum vel baronum nostrorum, sive aliorum tenentium de nobis in capite per servitium militare, mortuus fuerit, et cum decesserit haeres suus plenae aetatis fuerit et relevium debeat, habeat haereditatem suam per antiquum relevium; scilicet haeres vel haeredes comitis, de baronia comitis integra per centum libras; haeres vel haeredes militis, de feodo militis integro per centum solidos ad plus; et qui minus debuerit minus det secundum antiquam consuetudinem feodorum.

3. Si autem haeres alicujus talium fuerit infra aetatem et fuerit in custodia, cum ad aetatem pervenerit, habeat haereditatem suam sine relevio et sine fine.

4. Custos terrae hujusmodi haeredis qui infra aetatem fuerit, non capiat de terra haeredis nisi rationabiles exitus, et rationabiles consuetudines, et rationabilia servitia, et hoc sine destructione et vasto hominum vel rerum; et si nos commiserimus custodiam alicujus talis terrae vicecomiti vel alicui alii qui de exitibus illius nobis respondere debeat, et ille destructionem de custodia fecerit vel vastum, nos ab illo capiemus emendam, et terra committatur duobus legalibus et discretis hominibus de feodo illo, qui de exitibus respondeant nobis vel ei cui eos assignaverimus; et si dederimus vel vendiderimus alicui custodiam alicujus talis terrae, et ille destructionem inde fecerit vel vastum, amittat ipsam cus-

By a strained construction, the word 'haeredes' was held to include male as well as female heirs. (*Supra*, pp. 66, 81.)

Widows.

7, 8. A widow shall receive freely, within forty days of her husband's death, her dowry and inheritance; and shall have her quarantine (forty days' residence) in the family mansion. She shall not be forced to re-marry; but if she wish to do so, must obtain the lord's consent.

The King and other feudal lords sometimes forced the widows of their tenants to re-marry in order to gain the fine payable for consenting to the marriage. This abuse is here forbidden.

Aids of mesne lords.

15. The King shall not empower mesne lords to exact other than the three ordinary aids—to ransom the lord's person, to knight his eldest son, and once to marry his eldest daughter,—and these of reasonable amount.

Services.

16. No one shall be compelled to render more than the due service for a knight's fee or other free tenement.

Castle-guard.

29. No knight shall be compelled to pay for castle-guard, if he be willing to perform the service in person, or

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todiam, et tradatur duobus legalibus et discretis hominibus de feodo illo qui similiter nobis respondeant sicut praedictum est.

5. Custos autem, quamdiu custodiam terrae habuerit, sustentet domos, parcos, vivaria, stagna, molendina, et cetera, ad terram illam pertinentia, de exitibus terrae ejusdem; et reddat haeredi, cum ad plenam aetatem pervenerit, terram suam totam instauratam de carrucis et wainnagiis secundum quod tempus wainnagii exiget et exitus terrae rationabiliter poterunt sustinere.

6. Haeredes maritentur absque disparagatione, [ita tamen quod, antequam contrahatur matrimonium, ostendatur propinquis de consanguinitate ipsius haeredis.]

7. Vidua post mortem mariti sui statim et sine difficultate habeat maritagium et haereditatem suam, nec aliquid det pro dote sua, vel pro maritagio suo, vel haereditate sua quam haereditatem maritus suus et ipsa tenuerint die obitus ipsius mariti, et maneat in domo mariti sui per quadraginta dies post mortem ipsius infra quos assignetur ei dos sua.

8. Nulla vidua distringatur ad se maritandum dum voluerit vivere sine marito, ita tamen quod securitatem faciat quod se non maritabit sine assensu nostro, si de nobis tenuerit, vel sine assensu domini sui de quo tenuerit, si de alio tenuerit.

(on reasonable excuse) by a proper deputy; and whilst on service in the army, he shall be free from the duty of castle-guard.

Lands of felons.

32. The King shall not hold the lands of convicted felons except for a year and a day, at the expiration of which time the lands shall be given up to the lords of the fees.

By the Common Law, the lands of a person attainted of treason were forfeited to the Crown; but on attainder of petit-treason or felony, they escheated to the immediate lord, subject, however, in this case, to the King's right to hold them for a year and a day. (2 Hawkins, Pleas of the Crown, c. 49, ss. 1, 2.) By the 54th George III. c. 145, the forfeiture was limited, (except in the cases of treason, petit-treason, or murder,) to the life interest of the offender: but the personal property of all felons continued liable to be forfeited to the Crown down to 1870. In former times attainder also worked 'corruption of blood,' the effect of which was to prevent any inheritance being claimed from or *through* the attainted person. This harsh law was considerably mitigated by the 54th George III. c. 145, and other statutes, and finally by the 33rd & 34th Vict. c. 23, passed in 1870, it was enacted that (with the single exception of forfeiture consequent upon outlawry) 'no confession, verdict, inquest, conviction, or judgment of or for treason, or felony, or felo-de-se, shall cause any attainder, or corruption of blood, or any forfeiture or escheat.'

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9. Nec nos nec ballivi nostri seisiemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris sufficiunt ad debitum reddendum; nec pleggii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficit ad solutionem debiti; et si capitalis debitor defecerit in solutione debiti, non habens unde solvat, pleggii respondeant de debito; et, si voluerint, habeant terras et redditus debitoris donec sit eis satisfactum de debito quod ante pro eo solverint, nisi capitalis debitor monstraverit se esse quietum inde versus eosdem pleggios.

[10. Si quis mutuo ceperit aliquid a Judaeis, plus vel minus, et moriatur antequam debitum illum solvatur, debitum non usuret quamdiu haeres fuerit infra aetatem, de quocumque teneat; et si debitum illud inciderit in manus nostras, nos non capiemus nisi catallum contentum in carta.]

[11. Et si quis moriatur, et debitum debeat Judaeis, uxor ejus habeat dotem suam, et nihil reddat de debito illo; et si liberi

37. The King shall not have the wardship of land held in chivalry of a mesne lord, by reason of the sub-tenant also holding other land of the King, either in fee-farm, socage, burgage, or petit-serjeanty; nor the wardship of such fee-farm unless it owe military service. *Wardship of lands held of mesne lords.*

For an explanation of these feudal tenures see *supra*, pp. 65, 69.

43. The tenants of baronies escheated to the Crown shall only pay the same relief and perform the same services as if the lands were still held of a mesne lord. *Escheated baronies.*

46. Barons who have founded abbeys shall have the custody of them when vacant. *Abbeys of private foundation.*

The Constitutional importance of these remedial provisions, grouped under the head of 'Feudal Obligations,' consists in the evidence which they afford of the vexatious and increasingly onerous character of the exactions of the feudal monarchy of the Norman and early Angevin Kings.

II.—*Administration of Law and Justice.*

1/17. Common Pleas shall not follow the King's court, but be held in some certain place. *Common Pleas.*

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ipsius defuncti qui fuerint infra aetatem remanserint, provideantur eis necessaria secundum tenementum quod fuerit defuncti, et de residuo solvatur debitum, salvo servitio dominorum; simili modo fiat de debitis quae debentur aliis quam Judaeis.]

[12. Nullum scutagium vel auxilium ponatur in regno nostro nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem faciendum, et ad filiam nostram primogenitam semel maritandam, et ad haec non fiat nisi rationabile auxilium: simili modo fiat de auxiliis de civitate Londoniarum.]

13. Et civitas Londoniarum habeat omnes antiquas libertates et liberas consuetudines suas, [tam per terras quam per aquas.] Praeterea volumus et concedimus quod omnes aliae civitates, et burgi, et villae, et portus, habeant omnes libertates et liberas consuetudines suas.

[14. Et ad habendum commune consilium regni, de auxilio assidendo aliter quam in tribus casibus praedictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras; et

The intent of this clause was that suitors might always have a fixed and settled court to resort to, instead of being subjected, as formerly, to the great expense and inconvenience of following the king in his progresses through the kingdom.

Assizes. 18, 19. The recognitions of *Novel disseisin*, *Mort d'ancestor*, and *Darrein presentment* shall only be held in the court of the county where the lands in question lie. The King, or in his absence the Chief Justice, shall send two justices into each county four times a year, who, with four knights to be chosen by the county court, shall hold such assizes. If all the matters cannot be determined on the day appointed for each county, a sufficient number of knights and freeholders present at the assizes shall stay to decide them.

Amercements. 20. A freeman shall only be amerced, for a small offence after the manner of the offence, for a great crime according

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praeterea faciemus summoneri in generali, per vicecomites et ballivos nostros, omnes illos qui de nobis tenent in capite; ad certum diem, scilicet ad terminum quadraginta dierum ad minus, et ad certum locum; et in omnibus litteris illius summonitionis causam summonitionis exprimemus: et sic facta summonitione negotium ad diem assignatum procedat secundum consilium illorum qui praesentes fuerint, quamvis non omnes summoniti venerint.]

[15. Nos non concedemus de cetero alicui quod capiat auxilium de liberis hominibus suis, nisi ad corpus suum redimendum et ad faciendum primogenitum filium suum militem, et ad primogenitam filiam suam semel maritandam, et ad haec non fiat nisi rationabile auxilium.]

16. Nullus distringatur ad faciendum majus servitium de feodo militis, nec de alio libero tenemento, quam inde debetur.

17. Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo.

18. Recognitiones de nova dissaisina, de morte antecessoris, et de ultima praesentatione, non capiantur nisi in suis comitatibus et hoc modo; nos, vel si extra regnum fuerimus, capitalis justiciarius noster, mittemus duos justiciarios per unumquemque comitatum per quatuor vices in anno, qui, cum quatuor militibus cujuslibet comitatus electis per comitatum, capiant in comitatu et in die et loco comitatus assisas praedictas.

19. Et si in die comitatus assisae praedictae capi non possint, tot milites et libere tenentes remaneant de illis qui interfuerint

to the heinousness of it, saving to him his contenement; and, after the same manner, a merchant saving his merchandise, and a villein saving his wainage; the amercements in all cases to be assessed by the oath of honest men of the neighbourhood.

21. Earls and barons shall not be amerced but by their peers, and according to the degree of the offence.

22. No clerk shall be amerced for his lay tenement except according to the proportions aforesaid, and not according to the value of his ecclesiastical benefice.

These clauses (20, 21, 22) were primarily intended as a safeguard against the tyrannical extortions, under the name of amercements and fines, with which John had oppressed his people. At the same time they inculcate the general principle that punishments ought to be proportioned to the offence, and assert the right of all men, from the baron to the villein, to the *Judicium Parium.* The term 'amercement' is derived [through] the [old] French [*amercier*, from the Low Lat. *amerciare*, both meaning to fine], and signified the pecuniary mulct laid upon an individual who had offended the King.[1]

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comitatui die illo, per quos possint judicia sufficienter fieri, secundum quod negotium fuerit majus vel minus.

20. Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti; et pro magno delicto amercietur secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo salva mercandisa sua; et villanus eodem modo amercietur salvo wainnagio suo, si inciderint in misericordiam nostram; et nulla praedictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto.

21. Comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti.

22. Nullus clericus amercietur [de laico tenemento suo], nisi secundum modum aliorum praedictorum, et non secundum quantitatem beneficii sui ecclesiastici.

23. Nec villa nec homo distringatur facere pontes ad riparias, nisi qui ab antiquo et de jure facere debent.

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[1] [I have here amended, in accordance with Skeat's *Etymological Dictionary*, 1882, *s. v.* amerce, the erroneous etymology and explanation of this term, given in previous editions as being the current legal etymology and explanation. It is probable that the author simply followed Blount. Singularly enough, Mr. Lely, in his latest valuable edition of Wharton's *Law Lexicon*, still offers no explanation whatever of the etymology.—Ed.]

'Contenement' signifies that which is indispensable for a man's support and maintenance, according to his rank or occupation, as the armour of a soldier, the books of a scholar. Thus in Glanvill (l. ix. c. 8.) the mesne lord is to demand reliefs from his sub-tenants 'secundum facultates, ne nimis gravari inde videantur vel suum *contenementum* amittere.' 'Wainage,' (the wagon or wain, and other implements of husbandry,) was the contenement of the villein or husbandman. At the present day the tools (contenement) of a workman cannot be taken on a distress of rent.

Pleas of the Crown. 24. No sheriff, constable, coroner, or bailiff of the King shall hold pleas of the Crown.[1]

This clause is important as marking an era in the history of our Criminal judicature. It secured the trial of all serious crimes before the King's Justices, men of learning and experience in the law. Its practical effect was to take away from the County Court and the other inferior local tribunals,

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24. Nullus vicecomes, constabularius, coronatores, vel alii ballivi nostri, teneant placita coronae nostrae.

[25. Omnes comitatus, hundredi, wapentakii, et trethingii, sint ad antiquas firmas absque ullo incremento, exceptis dominicis maneriis nostris.]

26. Si aliquis tenens de nobis laicum feodum moriatur, et vicecomes vel ballivus noster ostendat litteras nostras patentes de summonitione nostra de debito quod defunctus nobis debuit, liceat vicecomiti vel ballivo nostro attachiare et inbreviare catalla defuncti inventa in laico feodo, ad valentiam illius debiti, per visum legalium hominum, ita tamen quod nihil inde amoveatur, donec persolvatur nobis debitum quod clarum fuerit; et residuum relinquatur executoribus ad faciendum testamentum defuncti; et si nihil nobis debeatur ab ipso, omnia catalla cedant defuncto, salvis uxori ipsius et pueris rationabilibus partibus suis.

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[1] [It should be remembered, with regard to Pleas of the Crown, as is noted by Bigelow, *Hist. of Procedure in Eng.*, p. 245, that the term *placita coronæ* was 'not yet used in the sense now attached to it. It simply meant business of concern to the Crown, reported to the Eyre by the jurors as having transpired in the particular district since the last visitation or report. The "pleas of the Crown" in the modern sense (*i. e.*, common criminal prosecutions) appear to have been tried mostly in the popular courts, before the coming of the Eyre, at least in the time of the Rotuli Curiæ Regis (1194—1199); and considered merely as prosecutions of crime, these were not "placita coronæ" at all.' To the same effect, Maitland, *Pleas of the Crown, Glouc.*, 5 *Hen. III.*, Int. p. xxvi., warns us that the 'distinction between the doing of penal justice and the collection of the king's income is only gradually emerging.' Mr. Maitland's interesting Introduction deserves careful study.—ED.]

the jurisdiction of nearly all Criminal matters. This important judicial reform was not a sudden act, but the result of a gradual process. In the 'Assize of Clarendon,' A.D. 1166, the Itinerant Justices and the Sheriffs are directed to share the office of judge between them.[1] A further step was taken in 1194, when it was ordered that no Sheriff should be a Justice in his own county.[2] Magna Charta deprived sheriffs and other local officers of all jurisdiction over pleas of the Crown. 'Pleas of the Crown' are Criminal prosecutions carried on in the name of the sovereign, 'who is supposed by the law,' remarks Blackstone, 'to be the person injured by every infraction of the public rights of the community.' The word 'constables' meant castellans, or constables of castles, of

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[27. Si aliquis liber homo intestatus decesserit, catalla sua per manus propinquorum parentum et amicorum suorum, per visum ecclesiae distribuantur, salvis unicuique debitis quae defunctus ei debebat.]

28. Nullus constabularius, vel alius ballivus noster, capiat blada vel alia catalla alicujus, nisi statim inde reddat denarios aut respectum inde habere possit de voluntate venditoris.

29. Nullus constabularius distringat aliquem militem ad dandum denarios pro custodia castri, si facere voluerit custodiam illam in propria persona sua, vel per alium probum hominem, si ipse eam facere non possit propter rationabilem causam; et si nos duxerimus vel miserimus eum in exercitum, erit quietus de custodia, secundum quantitatem temporis quo per nos fuerit in exercitu.

30. Nullus vicecomes, vel ballivus noster, vel aliquis alius, capiat equos vel caretas alicujus liberi hominis pro cariagio faciendo, nisi de voluntate ipsius liberi hominis.

31. Nec nos nec ballivi nostri capiemus alienum boscum ad castra, vel alia agenda nostra, nisi per voluntatem ipsius cujus boscus ille fuerit.

32. Nos non tenebimus terras illorum qui convicti fuerint de felonia, nisi per unum annum et unum diem, et tunc reddantur terrae dominis feodorum.

33. Omnes kydelli de cetero deponantur penitus de Thamisia et de Medewaye, et per totam Angliam, nisi per costeram maris.

34. Breve quod vocatur *Praecipe* de cetero non fiat alicui de aliquo tenemento unde liber homo amittere possit curiam suam.

35. Una mensura vini sit per totum regnum nostrum, et una mensura cervisiae, et una mensura bladi scilicet quarterium

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[1] Et hoc inquirant Justitiæ coram se, et vicecomites coram se. Assize of Clarendon, c. 1. (Select Chart. 137.)

[2] Forma procedendi in placitis Coronæ Regis, c. 21. Hoveden, iii. 262—267. (Select Chart. 252.)

which, in the time of Henry II., there were upwards of eleven hundred in England. These constables possessed considerable power, and within the precincts of the manors upon which their castles were built, held trials of criminal charges, as the sheriffs did within their respective counties. In manors not having a castle, the criminal and civil jurisdiction of the lords was exercised by the stewards or bailiffs. The convenience of secure prisons afforded by these private castles caused prisoners charged with crimes in the counties to be frequently committed to the custody of the constables, who too often abused their trust. Nearly two hundred years after the great Charter, a statute (5th Henry IV. c. 10) directed justices of the peace to imprison in the common gaol, 'because that divers constables of castles within the realm of England be assigned to be justices of the peace by commission from our lord the King, and by colour of the said commission they take people to whom they bear ill-will and imprison them within the said castles till they have made fine and ransom with the said constables for their deliverance.' The depriving of such men of the power to try prisoners was a great boon to the people.

Writ of Praecipe in capite.

X 34. The writ called *Praecipe* shall not in future be issued so as to cause a freeman to lose his court.

This seems to be a concession to the old feudal party.[1] Its object was to protect the local jurisdiction of the Courts baron. The tenant of a mesne lord, if disseised of his land,

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Londoniense, et una latitudo pannorum tinctorum, et russettorum, et halbergettorum, scilicet duae ulnae infra listas; de ponderibus autem sit ut de mensuris.

36. Nihil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris, sed gratis concedatur et non negetur.

37. Si aliquis teneat de nobis per feodifirmam, vel per sokagium, vel per burgagium, et de alio terram teneat per servitium militare, nos non habemus custodiam haeredis nec terrae suae quae est de feodo alterius, occasione illius feodifirmae, vel sokagii, vel burgagii; nec habebimus custodiam illius feodifirmae, vel sokagii, vel burgagii, nisi ipsa feodifirma debeat servitium militare. Nos

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[1] [The reasons for this clause being required by the Baronage are forcibly put by Bigelow, *Hist. of Procedure in Eng.*, p. 76. 'There was nothing to prevent the king from drawing into his court all the causes of the people; and on one pretext or another he did seriously invade the jurisdiction of other courts, especially of the Manorial Courts.' The jurisdiction of the King's Court, as Bigelow notes, was 'limited in fact only by the king's will.' On Constitutional grounds, therefore, it would seem well to have set some limits to it, if only on parchment.—ED.]

was obliged to sue for its recovery, in the first instance, in the court-baron of his immediate lord. The writ of *praecipe in capite* was the process by which such causes were called up into the King's court.

36. The writ of inquest of life or limb shall be given *gratis*, and not denied. *Writ De odio et atiâ*

The object of this clause was to prevent the long imprisonment of a person charged with a crime without examining into his guilt or innocence. The writ referred to was that '*De odio et atiâ*' (analogous to that of *Habeas Corpus*), and was the only means by which a person imprisoned on a charge of homicide could procure the privilege, in certain circumstances, of being released on bail to await the Iter of the King's Justices (Glanvill, lib. xiv. c. 3). The writ was not, however, issuable as of right, but only as a matter of Royal favour (ex regiæ potestatis beneficio). Advantage was taken of this circumstance during John's reign to extort large sums of money for the privilege (see Bracton, Vol. II., Introduction, lxii., by Sir Travers Twiss). Magna Charta made it grantable as a matter of right, and without payment. Henceforth it became one of the greatest securities of personal liberty.

38. No bailiff for the future shall put anyone to his law (*ad legem*) upon his own bare saying, without credible witnesses to prove it. *Wager of law.*

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non habebimus custodiam haeredis vel terrae alicujus, quam tenet de alio per servitium militare, occasione alicujus parvae sergenteriae quam tenet de nobis per servitium reddendi nobis cultellos, vel sagittas, vel hujusmodi.

38. Nullus ballivus ponat de cetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis.

39. NULLUS LIBER HOMO CAPIATUR, VEL IMPRISONETUR, AUT DISSAISIATUR, AUT UTLAGETUR, AUT EXULETUR, AUT ALIQUO MODO DESTRUATUR, NEC SUPER EUM IBIMUS, NEC SUPER EUM MITTEMUS, NISI PER LEGALE JUDICIUM PARIUM SUORUM, VEL PER LEGEM TERRAE.

40. NULLI VENDEMUS, NULLI NEGABIMUS, AUT DIFFEREMUS, RECTUM AUT JUSTICIAM.

41. Omnes mercatores habeant salvum et securum exire de Anglia, et venire in Angliam, et morari et ire per Angliam, tam per terram quam per aquam, ad emendum et vendendum, sine

The meaning of this clause has been disputed. By 'ad legem,' may have been signified the *ordeal*, to which reputed criminals were not to be subjected except on the presentment of a jury of the Hundred (Assize of Clarendon, in 1166; Richard I.'s Articles of Visitation, in 1194). But the ordeal was declared unlawful by the Lateran Council[1] in November, 1215, and this clause of the Charter was repeated in the re-issue of 9 Hen. III. c. 28. The *Mirror of Justice* (a compilation of the reign of Edward II. or the early part of Edw. III.) explains it, 'that no justice, no minister of the King, nor other officer nor bailiff, have power to make a freeman make oath without the King's command, nor receive any plaint without witnesses present, who testify the plaint to be true.' Wager of law was a relic of the old English trial by compurgators. Before a man could be put to his law or his oath, which meant the same thing, the accuser had to produce his witnesses, a practice which became obsolete in the time of Edward III., when the names of the fictitious and but lately defunct John Doe and Richard Roe, the common pledgers of prosecution, make their appearance. (See Reeves' Hist. of the Common Law, ed. Finlason, i. 283.)

'Ne exeat regno' restrained.

42. In future anyone may leave the kingdom and return at will, unless in time of war, when he may be restrained 'for some short space for the common good of the king-

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omnibus malis toltis, per antiquas et rectas consuetudines, praeterquam in tempore gwerrae, et si sint de terra contra nos gwerrina; et si tales inveniantur in terra nostra in principio gwerrae, attachientur sine dampno corporum et rerum, donec sciatur a nobis vel capitali justiciario nostro quomodo mercatores terrae nostrae tractentur, qui tunc invenientur in terra contra nos gwerrina; et si nostri salvi sint ibi, alii salvi sint in terra nostra.

[42. Liceat unicuique de cetero exire de regno nostro, et redire, salvo et secure, per terram et per aquam, salva fide nostra, nisi tempore gwerrae per aliquod breve tempus, propter communem utilitatem regni, exceptis imprisonatis et utlagatis secundum legem regni, et gente de terra contra nos gwerrina, et mercatoribus de quibus fiat sicut praedictum est.]

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[1] [A Conciliar Decree, it seems evident, could only bind *in foro conscientiæ*. And although it is true that the Judges of England, as of other countries, in the 13th century, were to a great extent Ecclesiastics, it may well be doubted whether they would have allowed the force of a Statute to the Decree of what in their eyes must have been an Œcumenical Council, while respecting it personally as binding in Morals. It is submitted, therefore, that this Decree should not be cited as though it had force to change the law of the land.—ED.]

dom.' Prisoners, outlaws, and alien enemies are excepted, and foreign merchants shall be dealt with as provided in the 41st clause (*infra*, p. 143).

This clause has some Ecclesiastical interest, as it removed a practical impediment in the way of appeals to Rome.[1] It was among the clauses reserved for further consideration in Henry III.'s first re-issue of the Charter, and was never afterwards restored. The Sovereign still retains the prerogative of preventing any subject from quitting the realm, by the writ *ne exeat regno*. Sir Edward Coke points out (3 Inst. ch. 84), that although by the Common Law every one had liberty to go abroad when he would, unless specially enjoined to remain at home, there were formerly certain orders of men under a continual prohibition from quitting the realm, without the King's previous licence. Peers were thus prohibited, because they were the councillors of the Crown; knights, because they were to defend the kingdom from invasion; all ecclesiastics, because they were confined by a special law (Assize of Clarendon, 10 Hen. II.), on account of their attachment to the See of Rome; and all archers and artificers, lest they should instruct foreigners how to rival the manufactures of England. In 1381, a statute (5 Ric. II. c. ii.) prohibited all persons whatever from going abroad without licence, except only the lords and other great men

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43. Si quis tenuerit de aliqua escaeta, sicut de honore Walingeford, Notingeham, Bononiae, Lainkastriae, vel de aliis eskaetis, quae sunt in manu nostra, et sunt baroniae, et obierit, haeres ejus non det aliud relevium, nec faciat nobis aliud servitium quam faceret baroni si baronia illa esset in manu baronis; et nos eodem modo eam tenebimus quo baro eam tenuit.

44. Homines qui manent extra forestam non veniant de cetero coram justiciariis nostris de foresta per communes summonitiones, nisi sint in placito, vel pleggii alicujus vel aliquorum, qui attachiati sint pro foresta.

[45. Nos non faciemus justiciarios, constabularios, vice-comites, vel ballivos, nisi de talibus qui sciant legem regni et eam bene velint observare.]

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[1] [Mr. Pearson, *Hist. Eng. Early and Middle Ages*, 1867, ii. 89, quotes this article as 'a signal protest against the passport system.' Unfortunately, it was 'reserved for consideration,' *t.* Hen. III., and never restored, so that the theory of the Crown, and the judgment of the nation, as given in Magna Charta, would seem to be still at issue, and the maintenance of the prerogative writ *ne exeat* keeps up the mediæval pretension that the Crown has the power of making prisoners of a whole nation, which would be absurd.—Ed.]

of the realm, true and notable merchants, and the King's soldiers. This was not repealed till the 4th James I. c. i. In his reign, however, various Acts were passed restraining, as a particular guard against the Papacy, the sending, without licence, any children out of the realm, to seminaries beyond sea, or for any cause whatever, as well as an Act (3 Jac. I. c. 4) making it felony for any person leaving the realm to serve a foreign prince. The writ *ne exeat* is now, in practice, only used to prevent a party to an action in respect of equitable debts and claims from withdrawing his person and property from the jurisdiction of the Court.

Forest courts.

¶ 44. Persons dwelling without [the limits of a] forest[1] shall not in future be compelled to attend the King's forest courts upon common summons, unless they be impleaded or be pledges for others attached for something concerning the forest.

Henry II., in the Assize of Woodstock (1184), had established an exact analogy between the courts of the Shire and those of the Forest, all men being required to attend the King's forest court, which exercised supreme jurisdiction over all woods and forests, whether part of the Royal demesne or not. He appointed Justices to visit the Forests at the same time and on the same system as the Justices Itinerant. Compulsory attendance at the Forest courts, which was regarded

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46. Omnes barones qui fundaverunt abbatias, unde habent cartas regum Angliae, vel antiquam tenuram, habeant earum custodiam cum vacaverint, sicut habere debent.

47. Omnes forestae quae aforestatae sunt tempore nostro statim deafforestentur, et ita fiat de ripariis quae per nos tempore nostro positae sunt in defenso.

[48. Omnes malae consuetudines de forestis et warennis, et de forestariis et warennariis, vicecomitibus et eorum ministris, ripariis et earum custodibus, statim inquirantur in quolibet comitatu per duodecim milites juratos de eodem comitatu, qui debent eligi per probos homines ejusdem comitatus, et infra quadraginta dies post inquisitionem factam, penitus, ita quod nunquam revocentur, deleantur per eosdem, ita quod nos hoc sciamus prius, vel justiciarius noster, si in Anglia non fuerimus.]

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[1] [The text of the Charter must mean without the limits of any forest in the Realm, and I have altered the translation so as to convey this meaning more clearly.—ED.]

as a great grievance, was abolished by this clause of the charter. Other remedial provisions were added in the Carta de Forestâ of Henry III. (1217).

45. Justices, constables, sheriffs, and bailiffs shall only be appointed of 'such as know the law and mean duly to observe it.' *Judges to be skilled in the law.*

54. No one shall be taken or imprisoned on the appeal of a woman except for the death of her husband. *Appeal by a woman for death of her husband.*

In cases of death by murder or manslaughter, an 'appeal' of felony was allowed to be brought by certain relations only of the deceased; by the widow for the death of her husband, or by the heir male for the death of his ancestor. The word 'appeal' is not used here in the ordinary sense of a complaint to a higher court for injustice done by an inferior one; but signifies an accusation or challenge, an original suit by one subject against another, rather because of his own peculiar

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[49. Omnes obsides et cartas statim reddemus quae liberatae fuerunt nobis ab Anglicis in securitatem pacis vel fidelis servitii.]

[50. Nos amovebimus penitus de balliis parentes *Gerardi de Athyes*, quod de cetero nullam habeant balliam in Anglia: *Engelardum de Cygoniis*,[1] *Andream*, *Petrum*, et *Gyonem de Cancellis*, *Gyonem de Cygoniis*, *Galfridum de Martyni* et fratres ejus, *Philippum Mark* et fratres ejus, et *Galfridum* nepotem ejus, et totam sequelam eorundem.]

[51. Et statim post pacis reformationem amovebimus de regno omnes alienigenas milites, balistarios, servientes, stipendiarios, qui venerint cum equis et armis ad nocumentum regni.]

[52. Si quis fuerit disseisitus vel elongatus per nos sine legali judicio parium suorum, de terris, castallis, libertatibus, vel jure

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[1] [On Gerard de Athyes, and Engelard de Cygoniis, see Maitland's *Pleas of the Crown for the County of Gloucester*, 5 *Hen. III.*, Introd., p. 13 *seq.* Mr. Maitland writes the names of these 'foreign adventurers,' 'Athée' and 'Cigogné,' and says that Athée, Cigogné, and Chanceaux (referring to Gyo de Cancellis), are all in Touraine, between Amboise and Loches. Gerard of Athyes is stated by Will. Brito (*Philippid.*) to have been '*servus et a servis oriundus utroque parenti*,' his lord being the lord of Amboise. To say, as Mr. Maitland says, that Gerard de Athyes 'must have been a man after John's own heart,' is to pass a judgment the severity of which it would be difficult to exceed. Pearson, *Hist. Eng. Early and Middle Ages*, ii. 90, suggests that the ignoble birth of the relations of Gerard may have made them 'specially obnoxious.' But this does not seem an adequate reason for a wholesale expulsion, if it ever took place, which seems doubtful. Cf. Luard, Preface, p. xxxv., vol. ii. of Matt. Paris, *Chron. Maj.* Engelard de Cygoniis and Philip Mark, at least, are found in England as peace disturbers, says Luard, citing Wendover, in 1221 and 1224.—ED.]

damage than for an offence against the public. The origin of this private process for the punishment of public crimes was doubtless derived from the old days when a *wergild* was payable to the relatives of the slain. The defendant in an appeal had the right of trial by battel. The parties were obliged to fight in their own persons, except the appellant were a woman, a priest, an infant, lame, blind, or sixty years old, in any of which cases he might 'counterplead the battel' and compel the defendant to put himself upon trial by his country. It was perhaps because the appellee lost his right of defending himself by combat when the appellant was a woman that her appeal was limited to the death of her husband. If the appellee were worsted in the combat, or found guilty, he suffered the same judgment as if convicted on an indictment: but the Crown had no power to pardon him, because an 'appeal' was a private suit. (See Glanvill, lib. 4; Bracton, lib. 3; Britton, lib. i.; Hawkins, Pleas of Crown, ii. 392.) From the date of the statute 3 Hen. VII. c. i., an appeal might be brought even after the appellee had been tried and acquitted on an indictment. The 'battel' took place in the presence of the Judges of the Court of Common

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suo, statim ea ei restituemus; et si contentio super hoc orta fuerit, tunc inde fiat per judicium viginti quinque baronum, de quibus fit mentio inferius in securitate pacis; de omnibus autem illis de quibus aliquis disseisitus fuerit vel elongatus sine legali judicio parium suorum, per Henricum regem patrem nostrum vel per Ricardum regem fratrem nostrum, quae in manu nostra habemus, vel quae alii tenent, quae nos oporteat warantizare, respectum habebimus usque ad communem terminum crucesignatorum; exceptis illis de quibus placitum motum fuit vel inquisitio facta per praeceptum nostrum, ante susceptionem crucis nostrae: cum autem redierimus de peregrinatione nostra, vel si forte remanserimus a peregrinatione nostra, statim inde plenam justiciam exhibebimus.]

[53. Eundem autem respectum habebimus, et eodem modo, de justicia exhibenda de forestis deafforestandis vel remansuris forestis, quas Henricus pater noster vel Ricardus frater noster afforestaverunt, et de custodiis terrarum quae sunt de alieno feodo, cujusmodi custodias hucusque habuimus occasione feodi quod aliquis de nobis tenuit per servitium militare, et de abbatiis quae fundatae fuerint in feodo alterius quam nostro, in quibus dominus feodi dixerit se jus habere; et cum redierimus, vel si remanserimus a peregrinatione nostra, super hiis conquerentibus plenam justiciam statim exhibebimus.]

54. Nullus capiatur nec imprisonetur propter appellum foeminae de morte alterius quam viri sui.

Pleas, attired in their scarlet robes, who sat looking on while the combatants, each armed with a staff an ell long, and a leathern shield, cudgelled each other from sunrise to star-rising, or until one of them cried 'craven.' Though long obsolete, neither appeals nor trials by battle were legally abolished till the early part of the present century.[1] In 1817 a writ of appeal was tried in the Court of King's Bench against Abraham Thornton, for the alleged rape and murder of Mary Ashford. The appellee, who had already been tried and acquitted at Warwick Assizes on the same charge, cast down his glove in open court and formally demanded trial by battle

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[55. Omnes fines qui injuste et contra legem terrae facti sunt nobiscum, et omnia amerciamenta facta injuste et contra legem terrae, omnino condonentur, vel fiat inde per judicium viginti quinque baronum de quibus fit mentio inferius in securitate pacis, vel per judicium majoris partis eorundem, una cum praedicto Stephano Cantuariensi archiepiscopo, si interesse poterit, et aliis quos secum ad hoc vocare voluerit; et si interesse non poterit, nihilominus procedat negotium sine eo, ita quod, si aliquis vel aliqui de praedictis viginti quinque baronibus fuerint in simili querela, amoveantur quantum ad hoc judicium, et alii loco illorum per residuos de eisdem viginti quinque, tantum ad hoc faciendum electi et jurati substituantur.]

[56. Si nos dissaisivimus vel elongavimus Walenses de terris vel libertatibus vel rebus aliis, sine legali judicio parium suorum, in Anglia vel in Wallia, eis statim reddantur; et si contentio super hoc orta fuerit, tunc inde fiat in marchia per judicium parium suorum, de tenementis Angliae secundum legem Angliae, de tenementis Walliae secundum legem Walliae, de tenementis marchiae secundum legem marchiae. Idem facient Walenses nobis et nostris.]

[57. De omnibus autem illis de quibus aliquis Walensium dissaisitus fuerit vel elongatus sine legali judicio parium suorum, per Henricum regem patrem nostrum vel Ricardum regem fratrem nostrum, quae nos in manu nostra habemus, vel quae alii tenent

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[1] [It may be well to add that trial by battle appears to have been of Norman introduction, and that it probably descended to the Normans from the Scandinavian Holmgang. Bigelow, *Hist. of Procedure in Eng.*, pp. 326—7, says that 'the duel became a feature of judicial procedure in England, if the absence of mention of it previously is conclusive, only upon the advent of the Normans.' It was, he notes, 'as common in Normandy before the Conquest as was the ordeal in England.' A case given in the same author's *Placita Anglo-Normannica*, 16, *Wulfstan, Bp. of Worcester*, v. *Abbot Walter*, probably *circa* 1077, shews the men of the Bishop ready to prove his case 'by oath and by battle,' and seems conclusive as to the early establishment of this Norman innovation, if such it was.—ED.]

against the appellant, the brother of the deceased. The Court having allowed the demand, time was given for due consideration of the novel circumstances of the case; ultimately the appellant declined to accept the challenge, and the defendant was discharged without bail on Oct. 20, 1818. (See *Ashford* v. *Thornton*, 1 Barn. & Ald. 405–461.) This led to the passing (22nd June, 1819) of the statute 59 George III. c. 46, intituled 'An Act to abolish appeals of Murder, Treason, Felony, or other offences, and Wager of Battel, or joining issue and trial by Battel in Writs of Right.'

III.—*Fundamental Principles of the Constitution.*

No scutage or extraordinary aid to be imposed except by the Common Council of the nation.

12. No scutage or aid shall be imposed unless *per commune concilium regni*, except in the three cases of ransoming the King's person, making his eldest son a knight, and once for marrying his eldest daughter; and for these the

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quae nos oporteat warantizare, respectum habebimus usque ad communem terminum crucesignatorum, illis exceptis de quibus placitum motum fuit vel inquisitio facta per praeceptum nostrum ante susceptionem crucis nostrae: cum autem redierimus, vel si forte remanserimus a peregrinatione nostra, statim eis inde plenam justiciam exhibebimus, secundum leges Walensium et partes praedictas.]

[58. Nos reddemus filium Lewelini statim, et omnes obsides de Wallia, et cartas quae nobis liberatae fuerunt in securitatem pacis.]

[59. Nos faciemus Allexandro regi Scottorum de sororibus suis, et obsidibus reddendis, et libertatibus suis, et jure suo secundum formam in qua faciemus aliis baronibus nostris Angliae, nisi aliter esse debeat per cartas quas habemus de Willelmo patre ipsius, quondam rege Scottorum; et hoc erit per judicium parium suorum in curia nostra.]

60. Omnes autem istas consuetudines praedictas et libertates quas nos concessimus in regno nostro tenendas quantum ad nos pertinet erga nostros, omnes de regno nostro, tam clerici quam laici, observent quantum ad se pertinet erga suos.

[61. Cum autem pro Deo, et ad emendationem regni nostri, et ad melius sopiendum discordiam inter nos et barones nostros ortam, haec omnia praedicta concesserimus, volentes ea integra et firma stabilitate gaudere in perpetuum, facimus et concedimus eis securitatem subscriptam; videlicet quod barones eligant viginti quinque barones de regno quos voluerint, qui debeant pro totis viribus suis observare, tenere, et facere observari, pacem et

aids shall be reasonable. In like manner it shall be concerning the aids of the city of London.

Method of summons to the National Council.

14. In order to take the common counsel of the Nation in the imposition of aids (other than the three regular feudal aids) and of scutage, the King shall cause to be summoned the archbishops, bishops, earls, and greater barons, by writ directed to each severally, and all other tenants *in capite* by a general writ addressed to the sheriff of each shire; a certain day and place shall be named for their meeting, of which forty days' notice shall be given; in all letters of summons the cause of summons shall be specified; and the consent of those present on the appointed day shall bind those who, though summoned, shall not have attended.

These two clauses (12, 14) surrender the Royal claim to arbitrary taxation, and lay down the principle that the Nation ought not to be taxed except by consent of the National Council. Talliages upon towns are not indeed included. The towns were still to a great extent in the position of demesne lands of the King or other lord, and their

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libertates quas eis concessimus, et hac praesenti carta nostra confirmavimus, ita scilicet quod, si nos, vel justiciarius noster, vel ballivi nostri, vel aliquis de ministris nostris, in aliquo erga aliquem deliquerimus, vel aliquem articulorum pacis aut securitatis transgressi fuerimus, et delictum ostensum fuerit quatuor baronibus de praedictis viginti quinque baronibus, illi quatuor barones accedant ad nos vel ad justiciarium nostrum, si fuerimus extra regnum, proponentes nobis excessum: petent ut excessum illum sine dilatione faciamus emendari. Et si nos excessum non emendaverimus, vel, si fuerimus extra regnum, justiciarius noster non emendaverit infra tempus quadraginta dierum computandum a tempore quo monstratum fuerit nobis vel justiciario nostro si extra regnum fuerimus, praedicti quatuor barones referant causam illam ad residuos de viginti quinque baronibus, et illi viginti quinque barones cum communa totius terra destringent et gravabunt nos modis omnibus quibus poterunt, scilicet per captionem castrorum, terrarum, possessionum, et aliis modis quibus poterunt, donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et reginae nostrae et liberorum nostrorum; et cum fuerit emendatum intendent nobis sicut prius fecerunt. Et quicumque voluerit de terra juret quod ad praedicta omnia exsequenda parebit mandatis praedictorum viginti quinque baronum,

inhabitants in a state of quasi-villeinage. They had yet to work their way into acknowledged participation in the rights here admitted to belong to all the free landholders of the kingdom. It is noticeable that in the 'Capitula quae Barones petunt et Dominus Rex concedit' (the rough draft of the barons' demands, subsequently embodied in the Charter,), after the provision against levying scutage or aids except by consent of the national council, occur the words: 'Simili modo fiat de *tallagiis* et auxiliis de civitate Londoniarum *et de aliis civitatibus* quae inde habent libertates.' The barons evidently intended to make the prohibition of arbitary taxation general, and to protect the citizens and burgesses equally with the landholders; but for some unexplained reason, these words were omitted in the Charter itself. The City of London can never have been regarded as a demesne of the Crown, and it is accordingly here ranked with the free tenants *in capite*. The word 'baron' was of wide signification, including, if not all freeholders, all free tenants in chief. It had not yet become a title in its modern acceptation. The citizens of London and of the Cinque Ports were sometimes designated 'barons.' While the 'greater barons' developed into the House of Lords,

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et quod gravabit nos pro posse suo cum ipsis, et nos publice et libere damus licentiam jurandi cuilibet qui jurare voluerit, et nulli unquam jurare prohibebimus. Omnes autem illos de terra qui per se et sponte sua noluerint jurare viginti quinque baronibus, de distringendo et gravando nos cum eis, faciemus jurare eosdem de mandato nostro, sicut praedictum est. Et si aliquis de viginti quinque baronibus decesserit, vel a terra recesserit, vel aliquo alio modo impeditus fuerit, quo minus ista praedicta possent exsequi, qui residui fuerint de praedictis viginti quinque baronibus eligant alium loco ipsius, pro arbitrio suo, qui simili modo erit juratus quo et ceteri. In omnibus autem quae istis viginti quinque baronibus committuntur exsequenda, si forte ipsi viginti quinque praesentes fuerint, et inter se super re aliqua discordaverint, vel aliqui ex eis summoniti nolint vel nequeant interesse, ratum habeatur et firmum quod major pars eorum qui praesentes fuerint providerit, vel praeceperit, ac si omnes viginti quinque in hoc consensissent; et praedicti viginti quinque jurent quod omnia antedicta fideliter observabunt, et pro toto posse suo facient observari. Et nos nihil impetrabimus ab aliquo, per nos nec alium, per quod aliqua istarum concessionum et libertatum revocetur vel minuatur; et, si aliquid tale impetratum fuerit, irritum sit et inane et nunquam eo utemur per nos nec per alium.]

[62. Et omnes malas voluntates, indignationes, et rancores,

the 'lesser barons' became absorbed in the mass of the commonalty, and were represented, with the towns, in the House of Commons. The significance of the 14th clause, as defining the method of summoning the National Council, will be discussed later on in the chapter on the 'Origin of Parliament.' Although the 12th and 14th clauses were omitted in Henry III.'s renewals of the Charter, the form of a grant appears to have been generally observed throughout his reign.[1]

[Prof. Burrows, *Arch. Rev.*, iv. p. 442, says that the title of 'baron' was applied to the freemen of several of the later Members of the Cinque Ports, 'with no mark whatever of the title being adopted in consequence of membership.'—ED.]

Judicium parium.

39. NO FREE MAN SHALL BE TAKEN OR IMPRISONED, OR DISSEISED, OR OUTLAWED, OR EXILED, OR ANYWAYS DESTROYED; NOR WILL WE GO UPON HIM, NOR WILL WE SEND UPON HIM, UNLESS BY THE LAWFUL JUDGMENT OF HIS PEERS, OR BY THE LAW OF THE LAND.

No sale, denial or delay of Justice.

40. TO NONE WILL WE SELL, TO NONE WILL WE DENY OR DELAY, RIGHT OR JUSTICE.

In these clauses of the Charter, remarks Sir James Mackintosh,[2] 'are clearly contained the Habeas Corpus and the Trial by Jury, the most effectual securities against oppression which the wisdom of man has hitherto been able to devise.' Hallam has termed them the 'essential clauses,' as being those which 'protect the personal liberty and property of all freemen, by giving security from arbitrary im-

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ortos inter nos et homines nostros, clericos et laicos, a tempore discordiae, plene omnibus remisimus et condonavimus. Praeterea omnes transgressiones factas occasione ejusdem discordiae, a Pascha anno regni nostri sextodecimo usque ad pacem reformatam plene remisimus omnibus, clericis et laicis, et quantum ad nos pertinet plene condonavimus. Et insuper fecimus eis fieri litteras testimoniales patentes domini Stephani Cantuariensis archiepiscopi, domini Henrici Dublinensis archiepiscopi, et episcoporum praedictorum, et magistri Pandulfi, super securitate ista et concessionibus praefatis.]

[63. Quare volumus et firmiter praecipimus quod Anglicana ecclesia libera sit et quod homines in regno nostro habeant et teneant omnes praefatas libertates, jura, et concessiones, bene

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[1] Scias quod comites et barones et omnes alii de toto regno nostro Angliae *spontanea voluntate sua et sine consuetudine concesserunt* nobis efficax auxilium ad magna negotia nostra expedienda.—Writ for collection of scutage, A.D. 1235, Brady, Introduct. Hist. Eng., App. 43, and Select Chart. 355.

[2] [Hist. Eng. i. 219—20.—ED.]

prisonment and arbitrary spoliation.' There is a breadth about the simple language employed, as if those who wrote it felt that they were asserting universal principles of justice. Henceforth 'it must have been a clear principle of our constitution, that no man can be detained in prison without trial. Whether courts of justice framed the writ of Habeas Corpus in conformity to the spirit of this clause, or found it already in their register, it became from that era the right of every subject to demand it.'[1] Sir Edward Coke, commenting on these clauses,[2] (as they stand combined in the 29th clause of the 9th of Henry III. with the words '*de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis*,' inserted after '*dissaisietur*'), points out that the evils from which the laws of the land are to protect the subject are here recited in the order in which they most affect him.

(1) *Nullus liber homo capiatur vel imprisonetur;* because the liberty of a man's person is more precious to him than all the rest that follows; and the word 'taken' includes the being restrained of liberty by petition or suggestion to the King or his council.

(2) *Aut dissaisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis;* meaning thereby that no man shall be dispossessed 'of his freehold—that is, lands or livelihood; or of his liberties or free customs—that is, of such franchises or free customs as belong to him of his free birthright.' The word 'liberties' has various significations, as the laws of the realm, franchises and privileges bestowed by the King, and the natural freedom possessed by the subjects of England: and as being opposed to this last, monopolies, in general, are contrary to the Great Charter.

(3) *Aut utlagetur, aut exuletur, aut aliquo modo destruatur.* By *outlawry* is signified the ejecting of a person, by three-

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et in pace, libere et quiete, plene et integre, sibi et haeredibus suis, de nobis et haeredibus nostris, in omnibus rebus et locis, in perpetuum, sicut praedictum est. Juratum est autem tam ex parte nostra quam ex parte baronum, quod haec omnia supradicta bona fide et sine malo ingenio observabuntur. Testibus supradictis et multis aliis. Data per manum nostram in prato quod vocatur Runingmede, inter Windelesorum et Stanes, quinto decimo die Junii, anno regni nostri septimo decimo.]

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[1] Hallam, Middle Ages, ii. [325].
[2] See Coke's Second Institute, i. 1—77; and Thomson, Magna Charta.

public proclamations, from the benefit of the law, a process which, from the time of Alfred until long after the reign of William the Conqueror, was available in the case of felony only, for which the penalty was death; and therefore an outlaw, having, as it was said, a wolf's head, might be slain by any man. Early in Edward III.'s reign it was enacted that none but the sheriff should put an outlaw to death, under pain of being considered guilty of felony; the only exception was when an outlaw was slain during an attempt to capture him. By *exile* is signified the being compulsorily banished, or forced to abjure the realm. For this cause, says Sir Edward Coke, the King cannot send any subject of England against his will on service out of this realm, lest, under pretence of service as ambassador or the like, he might be sent into exile contrary to the Charter. *Destroyed* is interpreted to mean 'fore-judged of life and limb, disherited, or put to torture, or death, and includes every oppression against law, by colour of any usurped authority.' Sir Edward also points out that the words 'in any manner' are added to the verb 'destroyed,' and to no other in the sentence, because everything in any manner tending to destruction is prohibited; thus, if a man be accused or indicted of treason or felony, his lands or goods can neither be seized into the king's hands, nor granted, nor even promised to another, before attainder, for until attainder, the accused ought to live of his own; and when a promise of the forfeiture had previously been made, it often followed that for private lucre undue means and more violent prosecution than the ordinary course of law would justify, were employed.

(4) *Nec super eum ibimus nec super eum mittemus;* inadequately translated in the Statutes at large by 'nor will we pass upon him, nor condemn him.' Sir Edward Coke explains these words: 'No man shall be condemned at the king's suit, either before the King in his bench, where the pleas are *coram rege* (and so are the words *nec super eum ibimus* to be understood), nor before any other commissioner or judge whatsoever (and so are the words *nec super eum mittemus* to be understood) but by the judgment of his peers —that is, equals, or according to the law of the land.' But the significance of the words is brought out much more clearly by Dr. Lingard, who remarks that John had hitherto been in the habit of *going* with an armed force, or *sending* an armed force on the lands and against the castles of all whom he knew or suspected to be his secret enemies, without observing any form of law.[1] The king's letters patent still

[1] Lingard, Hist. Eng. iii. c. i.

exist,[1] dated at Windsor the 10th of May, in the 16th year of his reign, about a month before the meeting at Runnymede, in which he attempted to detach the barons from the confederacy against him, by promising to them and their retainers specially what was afterwards granted to all the freemen of the realm: 'Sciatis nos concessisse baronibus nostris qui contra nos sunt quod nec eos nec homines suos capiemus, nec dissaisiemus, nec super eos *per vim vel per arma* ibimus, nisi per legem regni nostri, vel per judicium parium suorum *in curia nostra*.'

(5) *Nisi per legale judicium parium suorum, vel per legem terrae.* These words, which refer to and govern all that precedes, have been variously interpreted. Sir Edward Coke renders them, 'unless it be by the lawful judgment, that is, verdict of his equals (that is, men of his own condition), or by the law of the land (that is, to speak it once for all), by the due course and process of law.' The 'judicium parium' of Magna Charta is a phrase of wide signification,—the enunciation of a general legal principle rather than the technical definition of a mode of trial. 'It lay at the foundation of all German law; and the very formula here used is probably adopted from the laws of the Franconian and Saxon Caesars.'[2] But the mode of 'trial by peers,' with which the English people had gradually become familiarised since the Norman Conquest, and which Henry II. had made the established practice in both civil and criminal causes, was that of recognition by jury. It is probable, therefore, that by 'judicium parium,' trial by jury—of course in that stage of development only to which it had reached in the reign of John—was specially, though not exclusively, intended. The regular holding at short intervals of recognitions of novel disseisin, mort d'ancestor, and darrein presentment, was demanded by

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[1] Rot. Pat. 16 Joh. part 1. m. 3. d. n. 2., printed in Blackstone's Introduction to the Charters.

[2] Stubbs, Const. Hist. i. 537. Cf. the Constitution 'De Beneficiis' of Conrad the Salic (A.D. 1024—1036): Omnibus, &c., praecipimus et firmiter statuimus ut nullus miles episcoporum, abbatum, abbatissarum, marchionum vel comitum, vel hominum, qui beneficium de nostris publicis bonis aut de ecclesiarum praediis nunc tenent aut tenuerint, aut hactenus injuste perdiderint, tam de nostris majoribus valvassoribus, quam eorum militibus sine certa et convicta culpa suum beneficium perdat, nisi secundum consuetudinem antecessorum nostrorum *et judicium parium suorum*. . . Si contentio fuerit de beneficio inter capitaneos, coram imperatore definiri debet; si vero fuerit contentio inter minores valvassores et majores de beneficio, *in judicio parium suorum* definiatur per judicem curiae.—(Cujacius, *De Feudis*, Lib. V., cited in Kriegel's ed. of the *Corpus Juris*, tom. iii., p. 880, *seq.*) Similarly, Lothair II. declares: Sancimus ut nemo miles adimatur de possessione sui beneficii nisi convicta culpa quae sit laudanda *per judicium parium suorum* sicut supra dictum est. In the so-called 'Leges Henrici Primi' (xxxi. 7), we find the same principle expressed in nearly the same words: Unusquisque *per pares suos judicandus est.*

the barons (Art. 8), and granted by the Charter (Arts. 18, 19); and it is further provided that earls and barons shall be amerced only by their peers, and all other men by the equivalent jury of lawful men of the neighbourhood (Magna Charta, Arts. 21, 22). The words 'judicium parium' undoubtedly included the right of the great barons, as a matter of Parliamentary privilege, to be tried by their fellow barons, in all Pleas of the Crown, in the great court of the King. But they included also the right of every subject to be tried by a jury of his countrymen, in both criminal and civil suits. As regards civil matters, pleas between subject and subject, the general body of the freeholders were all 'pares,' and they could try, as jurors, any such pleas, whether the parties were barons or not; and in this case tbe doctrine that a baron could only be tried by his fellow barons, did not apply.[1] *Vel per legem terrae.*[2] The "judicium parium' was not applicable in all cases, as where trial by battle was legally demanded, or judgment went by default, or where there was no question of fact but merely a demurrer raised on a question of law, all of which were proceedings 'per legem terrae.' In the reign of Edward III., the words were expounded by several statutes to mean 'by due course of law,' 'by indictment or presentment of good and lawful men of the neighbourhood, or by writ original at the common law.'[3]

(6) *Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.* 'This is spoken,' remarks Sir Edward Coke, 'in the person of the King, who, in judgment of law, in all his courts of justice is present, and repeating these words;' wherefore all men, for all kinds of injuries, may have justice and right, 'freely without sale, fully without denial, and speedily without delay.' The proviso was probably mainly directed against the bribes or fines which were anciently paid to delay or expedite judicial proceedings, many instances of which are given in Madox's *History of the Exchequer*, ch. xii. The words 'to none will we sell' were intended to abolish the fines paid for procuring right or judgment; 'to none will we deny,' referred to the stopping of suits and the denial of writs; 'to none will we delay' meant the delays caused either by the counter-fines of defendants (who sometimes outbad the plaintiffs), or by the will of the King. This

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[1] Reeves (ed. Finlason), i. 285.

[2] [Bigelow, *Hist. of Procedure in Eng.*, p. 155, *n.* 3, on this clause of Mag. Chart., argues that the expression *per legem terræ* 'simply required judicial proceedings, according to the nature of the case,' and observes that 'jury trial in criminal cases had not come into use at this time, except as matter of special grace on the part of the king.'—ED.]

[3] See especially 25 Edw. III. c. 4.

clause of the Charter, says Madox, was so far effectual that fines for law proceedings became more *moderate*, and the evils alluded to gradually fell into disuse. In concluding his minute illustrations of these provisions of the Charter, Sir Edward Coke quaintly observes: 'As the gold-finer will not out of the dust, threds, or shreds of gold, let passe the least crum, in respect of the excellency of the metall: so ought not the learned reader to pass any syllable of this law, in respect of the excellency of the matter.'[1]

IV.—*Cities, Boroughs, Commerce.*

Liberties of London, &c.

13. The city of London shall have all its ancient liberties and free customs, and so of all other cities, boroughs, towns, and ports.

33. All wears ('kydelli') in the Thames and Medway and throughout England shall be put down, except on the sea-coast.

The object of this was to prevent private appropriations of the right of fishing in public rivers. The removal of wears from the Thames and Medway is directed in several ancient charters besides the present, and by many statutes.[2] [See *Law Magazine and Review*, No. cclxxii., for May, 1889, art. *The Law of River and Lake Fishery*, by W. H. Brown, M.A.—ED.]

Uniformity of weights and measures.

35. There shall be one standard of measures and one standard of weights throughout the kingdom.[3]

Uniformity of weights and measures had been enjoined in an Assize of Richard I.; and in the Articles of Visitation, issued by that King in 1194, the itinerant justices were directed to inquire 'de vinis venditis contra assisam, et de falsis mensuris tam vini quam aliarum rerum.' (Hoveden, iii. 263, iv. 33.) On the numerous statutory regulations of weights and measures subsequent to Magna Charta, see the Seventh Annual Report of the Warden of the Standards, 1872-3. The law on the subject is now embodied in the consolidating 'Weights and Measures Act, 1878' (41 & 42 Vict. c. 49), [as now amended by 52 & 53 Vict. c. 21, the Weights and Measures Act, 1889. The tenor of modern legislation

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[1] Coke, Second Institute, i. 77; Thomson, Magna Charta; Creasy, English Constitution [, ch. xi.].

[2] Stow, Survey, i. c. viii.; Thomson, Magna Charta, p. 214.

[3] [Pearson, *Hist. Eng.*, *Early and Middle Ages*, ii. 89, remarks on art. 35 as being 'so much in advance of possibilities that it has never yet been carried out.'—ED.

on this subject, as on some others practically affecting all ranks of the population, has been somewhat exclusively directed to the benefit of the so-called poor. It seems difficult to understand why the so-called rich should not be protected against false weights, but, at least for the important matter of bread, recent legislation pays no heed to any except the 'masses,' leaving the 'classes' practically unprotected, the bread which they mostly purchase being, by what seems a freak of the Legislature, styled 'fancy' bread, and not subject to any restrictions as to true weight. There seems no good reason for confining the right to have bread weighed to the one case of bread sold over the counter, which, as a rule, only protects the poorer purchasers. Weights and scales could as easily be carried in a baker's basket or hand-cart as in a coal-merchant's waggon, and then rich and poor alike could exercise the right at present limited to the case of coal.—ED.]

Foreign merchants.

41. All merchants shall have liberty safely to enter, to dwell and travel in, and to depart from, England, for the purposes of commerce, without being subjected to any evil tolls, but only to the ancient and allowed customs, except in time of war. On the breaking out of war, merchants of the hostile State who may be in England shall be attached, without damage to their bodies or goods, until it be known how our merchants are treated in such hostile State; and if ours be safe, the others shall be safe also.

This provision in favour of merchants and for the advancement of trade has been justly eulogised, as showing great breadth and liberality in days when the feudal barons throughout Europe were accustomed to oppress and pillage commerce. In Henry III.'s first re-issue of the Charter, the words 'nisi publice antea prohibiti fuerint' were inserted immediately after 'Omnes mercatores.' But such prohibition, observes Sir Edward Coke, must be by the common or public council of the realm, that is, by Act of Parliament.

V.—*Purveyance and other Royal Exactions.*

Purveyance.

28. No constable or other Royal bailiff shall take any man's corn or other chattels without immediate payment, unless the seller voluntarily give credit.

30, 31. Nor shall the King, his sheriffs, or bailiffs, take

any horses or carriages of freemen for carriage, or any man's timber for castles or other uses, unless by consent of the owner.

Purveyance (from *pourvoir*, to provide) was a prerogative enjoyed by the Crown 'of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without the consent of the owner, and also of forcibly impressing the carriages and horses of the subject to do the king's business on the public road, . . . upon paying a settled price; a prerogative which prevailed pretty generally throughout Europe.'[1] In Henry III.'s charters the restrictions on purveyance were modified and rendered less stringent. The abuses to which this system gave rise were manifold and grievous. The evil was never completely suppressed until the prerogative itself was resigned by Charles II. The right was even extended to men's labour as well as to their goods. Thus, Edward III. granted a commission to William of Walsingham to impress painters for the works at St. Stephen's Chapel, Westminster, 'to be at our wages as long as shall be necessary,' and directed all sheriffs to arrest and imprison such as should refuse. Edward IV. granted a similar commission for the impressment of workers in gold for the Royal household.[2]

Bridges. 23. Neither a town nor any man shall be distrained to make bridges or banks, unless anciently and of right bound to do so.

Ferm of counties, &c 25. Counties, hundreds, wapentakes, and trethings shall stand at the ancient ferms, without any increase, except the manors of the Royal demesne.

It was customary for the King to farm out by the year, to the highest bidder, the sheriffdoms of counties and other offices. The officials recouped themselves by the exaction of excessive fines and fees, so that the people were the real sufferers by the exaction of an increased rental.

[Trethings, *supra*, = Ridings.—ED.]

Debts due to the Crown, 9. Land or rent shall not be seized for any debt due to the Crown, so long as the chattels of the debtor will suffice; sureties shall not be distrained while the principal debtor is

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[1] Blackstone, Comm. i. 287.
[2] Rymer, t. vi. 417; t. xi. 852; Hallam, Middle Ages, iii. 149.

capable of payment, and if they have to pay, they shall be indemnified out of the lands and rents of their principal.

10, 11. Debts due to the Jews are to bear no interest during the minority of the heir of a deceased debtor; the widow shall have her dower, and pay nothing of the debt; and the children shall be provided with necessaries before payment of the debt out of the residue. *and to the Jews.*

In all debts due to the Jews, the Crown had an ulterior interest. They were the King's bondmen, and are so described in 'Les Estatuz de Jeuerie' of Edward I.'s reign, which direct that every Jew of the age of twelve years and upwards shall pay threepence annually 'de taillage au Rey ky serf il est,' and that they shall not pay scot or lot, or be taxed with the men of the cities or boroughs, 'cum il sunt taillables al Rey comes ses serfs e a nul autres for a Rey.' (Stat. of the Realm, pp. 221-2.) Under the Norman and early Angevin Kings the Jews were employed 'as a sponge' to suck up the wealth of their subjects, and be periodically squeezed to supply the wants of the Crown. Madox (*History of the Exchequer*, 2nd ed., ii. 221—261) thus sums up their position as disclosed by the Exchequer records: 'The King seemed to be absolute lord of their estates and effects, and of the persons of them, their wives, and children. 'Tis true he let them enjoy their trade and acquests, but they seemed to trade and acquire for his profit as well as their own; for at one time or other their fortunes, or great part of them, came into his coffers.' [Mr. Bridges of Oriel, in his very interesting essay on *The Jews of Europe in the Middle Ages*, tells us that the 'employment of Jews as an engine of taxation was far more thoroughly and systematically carried out in England than in any other country. . . . But it was not till the reign of Henry II. that the control of their affairs absorbed the cares of a special office of state. The Scaccarium Judaismi, or Exchequer of Jewry, was the name of this office; it was a branch of the General Exchequer; but it was managed by its own justiciaries (at first both Jew and Christian, afterwards Christian only), who enjoyed all the immunities of barons of the Exchequer; it had branch offices in the chief cities of the realm and a numerous service of clerks and treasurers.'—*Oxford Essays for* 1857, pp. 218 *seq.*—ED.]

26. On the death of a tenant *in capite* of a lay fee, indebted to the Crown, the sheriff or other bailiff may attach the chattels of the deceased found upon his lay fee, to the

value of the debt, by the view of lawful men; and nothing shall be removed until the whole debt be paid, the surplus being left to the executors to fulfil the testament of the deceased. If nothing be found due to the King, all the chattels shall go to the use of the deceased, saving to his wife and children their reasonable shares.

The rigour with which the King's debts were exacted and levied was the subject of frequent complaints, and is strongly animadverted upon in the *Mirror of Justice* (c. v. s. 2. art. xxviii).

General application.

By clause 60, to which reference has already been made, all the foregoing rights and liberties granted to the King's vassals are expressly extended to the whole nation. The Charter concludes: '63. Wherefore we will and firmly enjoin that the Church of England be free, and that all men in our kingdom have and hold the aforesaid liberties, rights, and concessions, well and in peace, freely and quietly, fully and wholly, to them and their heirs, of us and our heirs, in all things and places for ever as aforesaid.' This is followed by the oath to be taken by the King and the barons, mutually to observe all the articles of the Charter, in good faith and without evasion.

Enacting words and oath.

Temporary provisions.

Clauses 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, and 62 have been omitted from this summary, as being mainly of a special and temporary character, but may be found in full in the Latin text. They relate principally to the reform of the Forests, the surrender of charters and hostages placed in the king's hands as securities, the dismissal of his foreign servants and mercenary troops, the rights of the Welsh and of the King of Scots, and the grant of a general political amnesty.

Mode of enforcing the Charter.

There remains only the 61st clause, by which means were provided for enforcing the due observance of the Charter. The question, how should the compact between the King and his people be enforced, was at once difficult and pressing. The King was left in possession of the Regal power and dignity; experience had shown the ease with

which former sovereigns had broken their most solemn written engagements; and the insincerity of John was notorious. At this period there were no effective Constitutional checks against the King; and so a rude device was hit upon, in its nature really impracticable, by which John granted, in effect, to all his subjects a qualified liberty of rebellion. The whole baronage were to elect a Council of Twenty-five barons charged to take care with all their might that the provisions of the Charter were carried into effect. If the King or any of his officers should violate the Charter in the smallest particular, these Barons, or four of their number, were to complain to the King, or in his absence to the Justiciar, and demand instant redress. If no redress be given within forty days, 'the said five-and-twenty barons, together with the commonalty of the whole land (*communa totius terrae*) shall distrain and distress us in all possible ways, by seizing our castles, lands, possessions, and in any other manner they can, till the grievance is redressed according to their pleasure, saving harmless our own person and the persons of our queen and children; and when it is redressed they shall obey us as before. And any person whatsoever in the land may swear that he will obey the orders of the five-and-twenty barons aforesaid in the execution of the premises, and will distress us, jointly with them, to the utmost of his power; and we publicly and freely give liberty to anyone that shall please to swear this, and never will hinder any person from taking the same oath. As to all those in the land who will not of their own accord swear to join the five-and-twenty barons in distraining and distressing us, we will issue orders to make them take the same oath as aforesaid.'

The twenty-five Conservators.

The national unity recognised.

John soon gave evidence of his intention to break from the Charter if he could. He applied for aid to the Pope, now his suzerain, who declared the Charter void, excommunicated the Barons, and suspended Archbishop Langton. The City of London also, which had ardently supported the Barons in their demands, and whose Mayor was one of the

John attempts to evade the Charter

council of twenty-five executors, was laid under interdict. In addition to these spiritual arms, John sent for a body of mercenaries and renewed the Civil war. The mercenaries, as professional soldiers, proved themselves an overmatch for the Barons with their half-trained retainers. In this extremity, the Barons determined to renounce their allegiance to John and to dethrone him by the aid of Louis, eldest son of Philip Augustus of France, to whom they made a formal offer of the English crown.[1] Louis at once sent aid to the Barons, and himself landed in England on the 21st of May, 1216. But for John's unexpected death, on the 19th of October following, it is highly probable that a change of dynasty would have been carried out.

and renews the civil war.

The Barons offer the crown to Louis of France.

Death of John, 19 Oct. 1216.

Accession of Henry III.

At the death of John things looked badly for the succession of his son Henry, then only nine years old. Louis was in the south, the Scots in the north, as enemies, and the Welsh March was for a time the only place of refuge for the Angevin dynasty. Without delay, on the 28th of Oct. 1216, the boy Henry was crowned at Gloucester by the Papal legate Gualo;[2] and William Marshal, Earl of Pembroke, assumed, with the assent of the friendly barons, the title of *Rector Regis et Regni.* The Regent, by his politic conduct, contrived, within the space of a twelvemonth, to bring over the disaffected baronage to the King's side, and to induce Louis, after the 'Fair of Lincoln' (May 29, 1217), and the loss of his reinforcements in the naval engagement off Dover (Aug. 24), to abandon his pretensions to the English crown.

Earl of Pembroke *Rector Regis et Regni.*

Henry III.'s First Charter, 1216.

One of the first acts of the Earl of Pembroke had been to renew the Great Charter at a meeting of the Royalist prelates and barons held at Bristol on the 24th November, 1216, a few weeks after John's death. The alterations in

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[1] Ann. Waverl. 283; Rymer, i. 140; Matt. Paris [*Chron. Maj.*, ed. Luard, ii. 647. They cursed John and the Pope, and, after a little hesitation whom to elect, chose Louis.—ED.]

[2] [This act of the Legate was undoubtedly an infringement of the rights of the See of Canterbury, but was probably acquiesced in by all parties for the sake of the Papal confirmation thereby given to Henry's succession at a very critical moment.—ED.]

the reissue are numerous. The merely temporary provisions of John's charter were omitted as a matter of course. But there were also omitted the 12th and 14th clauses, forbidding the levying of extraordinary aids without the consent of the *Commune Concilium regni*, and regulating the mode in which that Council was to be summoned, as well as all other clauses which in any way restricted the King's power to increase his revenue. In clause 42 of the re-issue the King's ministers assign as their reason for the omission, that these articles being 'gravia et dubitabilia,' the prelates and barons had thought it best that the consideration of them should be respited until such time as, together with such other things as pertained to the welfare of all, they could be fully considered and established. The 42nd clause of John's charter, in restraint of the King's prerogative to prevent any of his subjects from quitting the kingdom, and the 45th, as to the qualifications of the King's Justices, were also left out. The alterations in the Feudal clauses are characterised by the greater authority conceded to the mesne lords over their sub-vassals, a retrograde policy which was probably dictated by a desire to conciliate the baronage.[1]

Henry III.'s Second Charter, and Charter of the Forest, 1217. Omissions.

In the following year (1217), after Louis had finally quitted the kingdom, the Great Charter was again re-issued, with many further important omissions, alterations, and additions. The Forest clauses, which had been retained in the preceding Charter, were now omitted, being embodied in the Charter of the Forest, which was issued about the same time.[2] The respiting clause (42) was also

[1] A duplicate of Henry III.'s first charter was transmitted to Ireland, under the seals of the Legate and the Protector, for the benefit of the king's faithful subjects there, with some few alterations which the local necessities of that island required.—Blackstone, Introduction to the Charters.

The Forest Charter.

[2] No Forest Charter was issued by John separately from the Forest clauses (44, 47, 48) of Magna Charta. By these, in addition to the abolition of compulsory attendance at the Forest Court already referred to, all forests made during John's reign were deafforested; a searching inquiry into the Forest usages to be made by an inquest of 12 sworn knights was promised, and all bad customs were at once to be abolished. The first Forest Charter was issued by the Earl of Pembroke, in Hen. III.'s name, on the 16th November, 1217.

left out, provision being made in this and the Forest Charter for several of the matters previously respited, and as to the other matters, their absence was to some extent supplied by a new clause in this re-issue (46), saving all existing liberties and free customs. The chief alterations are: In the 'essential clauses' of John's charter (39, 40), the words already referred to (*supra*, p. 138) were added, apparently for the sake of greater accuracy; and, probably as a concession to the old Feudal party, who regarded with dislike all extension of the central Royal jurisdiction, the assizes of the Itinerant Justices were reduced from four to one annually; and the direction for the election by each county of four knights to take the recognitions is omitted, the knights of the county generally being substituted.

Alterations.

New clauses:

Alienation of land.

County Court.

Sheriff's Tourn.

In addition to the 46th, the other new clauses in Henry's second Charter are the 39th, 42nd, 43rd, 44th, and 47th. By clause 39 land was forbidden to be aliened by gift or sale, unless sufficient were retained to answer for the services due to the superior lord of the fee.[1] The 42nd directs that the County Court shall be holden but from month to month, the Sheriff's Tourn but twice in the year, and the view

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It contains 17 articles, by which the most grievous burdens of the Forest laws, as formulated by Hen. II. in the Assize at Woodstock, 1184, were either repealed or mitigated. The forests were still suffered to remain 'an oasis of despotism in the midst of the old common law;' but the restriction on the jurisdiction of the Forest Courts imposed by the 44th clause of John's charter was maintained, and all lands afforested by Richard and John were to be at once deafforested, as well as such lands afforested by Henry II. as were not within the bounds of the Royal demesne. The penalty of death or mutilation was forbidden for the future, fine, imprisonment, or banishment from the realm being substituted (art. 10); but the cruel mutilation of dogs, in order to prevent them from being used in hunting, was expressly retained and regulated (three claws of the forefoot were to be cut off). See the Charter of the Forest, and the Assize of Woodstock, with which it should be compared, in Select Chart. 150, 339.

[1] This prohibition applied both to tenants *in capite* and to tenants of mesne lords. It was doubted whether tenants *in capite* could aliene any part of their lands without the Royal licence, but by statute 1st Edward III. c. 12, it was declared that the king should not hold such lands as forfeit, but that a reasonable fine should be paid into the Chancery. With regard to tenants of mesne lords, this prohibition of Magna Charta was repealed by the statute *Quia Emptores*, 18th Edward I., which put a stop to sub-infeudation and gave free liberty of alienation in whole or in part, with reservation of the services to the superior lord of the fee. *Supra*, p. 67.

of Frankpledge at Michaelmas; regulations probably dictated by the jealousy of the feudal lords exercising local franchises. Frankpledges.

The 43rd restrains fraudulent gifts in mortmain to religious corporations: 'It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house; nor shall it be lawful to any religious house to take the lands of any, and to leave the same to him of whom he received it. If any from henceforth give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee.'[1] Mortmain

The 44th clause asserts the King's right to scutage '*sicut capi consuevit tempore Henrici regis avi nostri:*' and the 47th directs the immediate destruction of the '*castra adulterina*' (a phrase forcibly recalling the disorders of Stephen's reign), either erected or rebuilt since the commencement of the Barons' war. Scutage. [Adulterine] Castles to be demolished.

In the 9th year of his reign, Henry, who was now declared of age, re-issued Magna Charta and the Charter of the Forest, in consideration of the grant of an aid of a 'fifteenth.' They contained only two alterations of importance: (1) In the preamble, the words '*spontanea et bona* Henry III.'s Third Charter, 1225. 9 Henry III.

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[1] The term mortmain, *in mortuâ manu*, applies generally to alienations of lands or tenements to *any* corporation, sole or aggregate, ecclesiastical or temporal; but it is used specially with reference to religious houses, whose enormous acquisitions of landed property and subtle evasions of the law gave rise to a series of restraining enactments. The earlier measures seem to have been specially directed against the fraud so frequently committed upon the feudal lords by pretended and colourable donations to religious houses with the intention of receiving the lands back again freed from the feudal obligations. Henry II. endeavoured to check this abuse by exacting scutage and the other feudal dues from the lands held in chief by the clergy (Const. of Clarendon, c. xi.); and the present clause of the Great Charter seems to refer to fraudulent as opposed to innocent alienations. But its effect, as expounded in the following reign by the Statute *de Religiosis*, 7th Edward I., was to prohibit gifts of land to religious houses generally—*i. e.*, even in cases where the religious house did not give the land back to hold of the house, but kept it in its own hands. The clerical evasions of this statute were successively and at length effectually met by the 13th Edward I. (Westminster II.) and the 15th Richard II. c. 5.—Coke, 2 Inst. 74; Reeves (ed. Finlason), i. 274. [Creasy, Eng. Const. ch. xi.—Ed. *Mortmain.*

voluntate nostra' were substituted for the '*consilio;*' a change which, though capable of being interpreted as an assertion on the King's part of his independence of the counsel of his baronage, was, with greater probability, intended to obviate any subsequent evasion by him on the ground that his former Charters, having been granted by others in his name during his minority, were no longer binding on himself.[1] (2) A final clause was added specifying the grant of the 'fifteenth' as the price of the King's concession: 'And for this our gift and grant of these liberties and of other liberties contained in our charter of liberties of the forest, the archbishops, bishops, abbots, priors, earls, barons, knights, freeholders, and all our subjects have given unto us the fifteenth part of all their moveables. And we have granted unto them for us and our heirs that neither we nor our heirs shall procure or do anything whereby the liberties in this charter contained may be infringed or broken; and if anything be procured by any person contrary to the premises, it shall be had of no force nor effect.'[2]

Subsequent confirmations of the Charter.

It is in the form in which it was promulgated in the 9th Henry III. that Magna Charta was confirmed by Edward I. in the twenty-fifth year of his reign. The copy which heads our statute book is taken from an *Inspeximus* of the Charter, so called from the letters patent prefixed in the name of Edward I., '*Inspeximus Magnam Chartam domini Henrici quondam regis Angliae patris nostri de libertatibus Angliae in haec verba.*' Regarding the Charter as the palladium of the nation's liberties, the people for centuries were ever ready to purchase its confirmation from successive Kings by the grant of a liberal subsidy. In this way it was solemnly confirmed no

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[1] Post multas vero sententiarum revolutiones, communiter placuit, quod rex tam populo quam plebi libertates, *prius ab eo puero concessas, jam major factus indulsit.*—Ann. Dunstapl. p. 93, *s. a.* 1225; Select Chart. 314.

[2] Stat. of the Realm, Charters of Liberties, 22—25.

less than thirty-seven times down to the second year of Henry VI.[1]

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[1] The Charter was confirmed:

6 times by Henry III.	6 times by Richard II.
3 ,, Edward I.	6 ,, Henry IV.
14 ,, Edward III.	Once by Henry V.
	,, Henry VI.

'To have produced it,' remarks Sir James Mackintosh, 'to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind. Her Bacons and Shakespeares, her Miltons and Newtons, with all the truth which they have revealed, and all the generous virtue which they have inspired, are of inferior value when compared with the subjection of men and their rulers to the principles of justice, if indeed it be not more true that these mighty spirits could not have been formed except under equal laws, nor roused to full activity without the influence of that spirit which the Great Charter breathed over their forefathers.' (Hist. Eng. i. 221.) [Lingard, iii. p. 58 (ed. 1851), counts the confirmations as thirty-eight, ascribing fifteen to Edward III., instead of fourteen, as here reckoned.]

[I have left the text as it stood, on the homage by John, only altering Pandulf's title from Legate to Envoy, as, with Greenwood, *Cath. Pet.*, v. 588, I see no proof that he was Legate in 1215, and he is not so described in Magna Charta. I should not myself admit that in the Middle Ages any disgrace attached to holding of the Roman See any more than to holding of the Roman Empire. But John's character gave the submission a different aspect from that which it might have borne under another King. The cases of Peter of Arragon and the King of Man, cited by me in the present edition, shew that there was nothing unusual in the action of the Roman See with regard to the Crown of England. Under Innocent III., indeed, such action was rather to be expected than otherwise, where the circumstances were favourable to advancing a claim on the part of the Holy See. The much earlier case of the Normans in Apulia and Sicily, and the Hungarian and Bulgarian cases, shew that the practice of claiming Kingdoms and Principalities to be held as fiefs of the Roman See, or even creating them on such terms, was no innovation on Innocent's part, but went back, in the traditions of the Papacy, at least as far as Gregory VII.—Ed.]

CHAPTER V.

ADMINISTRATIVE SYSTEM UNDER THE NORMAN AND PLANTAGENET KINGS.

The King personally took part in all branches of administration.

AT the head of the whole Administrative system was the King himself, personally taking part not only in legislation but in fiscal, judicial, and every other kind of executive business.[1] It was not till long after the Conquest that the kings of the English ceased, occasionally at least, to attend and take part in the proceedings of their Courts of Law. Henry II. was accustomed to assist in dispensing justice both in the Curia Regis and in its financial committee the Exchequer.[2] Some of his sayings on the judgment seat have been preserved. In a case tried before him, shortly after his accession to the throne in 1154, the defendant alleged that a charter of Henry I. produced in evidence had been improperly obtained. '*Per oculos Dei*,' exclaimed the King, taking the Charter into his own hands, '*si cartam hanc falsam comprobare posses, lucrum mille librarum mihi in Anglia conferres.*'[3] In another case, a dispute, be-

[1] The Norman period, comprising the reigns of the Conqueror and his three successors, was 'the epoch of the growth of a new administrative system, having the source of its strength in the royal power.' Stubbs, Const. Hist. i. 337. [Of this period Green says, *Hist. Eng. People*, i. 124, 'It was in these years of subjection that England first became really England. . . . The new nation grew to a sense of its oneness, and this consciousness was strengthened by the political ability which in Henry the First gave it administrative order and in Henry the Second built up the fabric of its law.'—ED.]

[2] Domini Regis Curia, in qua ipse in propria persona jura decernit. Dial. de Scac. i. c. 4.

A trial before Henry II. in person.

[3] *Walter, Abbot of St. Martin of Battle* v. *Gilbert de Balliol* (Chron. Monasterii de Bello, 106; Bigelow's Placita Anglo-Normannica, 175). This case is interesting for the light which it throws alike on the working of the feudal tenures, the system of judicature, and the social aspects of the 12th century.

tween Baldwin, Archbishop of Canterbury and the Abbot of St. Edmund as to a territorial franchise, we are told that the King, puzzled by the production of conflicting charters, declared '*Nescio quid dicam: nisi ut cartae ad invicem pugnent.*' And when the Archbishop subsequently refused to accept the Abbot's offer to submit the dispute to the verdict of the counties of Norfolk and Suffolk, the King angrily arose and left the court, saying, '*Qui potest capere capiat.*'[1] King John personally decided a case in

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The Abbot of St. Martin had acquired certain lands, partly by purchase and partly by gift, from a sub-tenant of the Manor of Barnhorn, with the consent of Withelard de Balliol, who held the same of the Count of Eu: and the donation had been confirmed by the Count and by the King (Henry I.). Withelard afterwards disseised the Abbot for refusing 'exactions,' and no restitution was obtainable either during the remainder of Henry I.'s reign, or under Stephen, 'in whose time justice was little regarded, and he who was strongest got most.' On the accession of Hen. II. 'qui avita tempora renovaret,' Abbot Walter renewed his claim against Gilbert de Balliol, the heir of Withelard, and the King grants a writ to John, Count of Eu, commanding him, personally or by the Sheriff of Sussex, to do justice to the Abbot. The defendant manages by various subterfuges to evade the trial; and at length the plaintiff, with much difficulty, gets the suit called up into the *Curia Regis*. But the King is unable to attend personally, and the cause, though much litigated before the King's Justices, is brought to no satisfactory conclusion. Ultimately the suit comes before the King himself at Clarendon. The Abbot's case is stated by Osmund, a monk of Battle, and Peter de Chriel, a knight, and the deeds of purchase and donation and the charters of confirmation are read in Court. The defendant objects that the deeds of his ancestors have no seal. Thereupon Richard de Lucy, the Chief Justice (who was also, we are told, the Abbot's brother), asks whether the objector himself has a seal, and on receiving an affirmative reply, sneers at the modern custom for every little knight to have a seal, and overrules the objection. ('Moris,' inquit, 'antiquitus non erat quemlibet militulum sigillum habere, quod regibus et praecipuis tantum competit personis, nec antiquorum temporibus homines ut nunc causidicos vel incredulos malitia reddebat.') Undismayed, Gilbert proceeds to question the confirmatory charter of Henry I.; whereupon the King interposes with the exclamation 'Per oculos Dei,' given in the text, and adds: 'Si monachi per similem cartam et confirmationem hujusmodi jus in praesenti loco scilicet Clarendona, quem plurimum diligo, se habere possent ostendere, nihil esset in quo eis juste possem contradicere, quo minus eis omnino dimitteretur.' Then turning to the Abbot and his advocates, '"Ite," inquit, "et consilio habito, invicem conferte, si forte sit aliquid cui amplius quam huic cartae velitis inniti. Non tamen vos puto ad praesens aliam quaesituros probationem."' After this expression of opinion from the Court, it is not surprising that the Abbot, though he retired in obedience to the Royal command, quickly returned and expressed his intention to produce no further proof but to take his stand upon the charter. Judgment is given for the plaintiff, 'unanimi consensu totius curiae,' followed by a king's writ 'ad quatuor milites qui tunc ex ejus praecepto vicecomitatum Suthsexiae regebant,' directing them to ascertain the boundaries of the lands in question, by the oaths of twelve men of the vicinage, and then to reinstate the plaintiff. Which was accordingly done by Richard de Chaaines, one of the four knights, 'sociorum suorum sibi vice commissa.'

[1] *Archbishop of Canterbury* v. *Abbot of St. Edmund. Circa* A.D. 1186.

the Exchequer in the sixth year of his reign. Henry III. frequently sat in Westminster Hall with his Judges; and several instances are recorded of criminal jurisdiction exercised in person by John, Henry III., Edward I., and Edward II.[1] Still the exercise of ordinary jurisdiction by the King was an exception to the general rule. Edward IV., we are told, sat in the King's Bench for three consecutive days, in order to see how his laws were executed, but it is not said that he interfered in the proceedings.[2] By the usage of many centuries it has now been long an undisputed principle that, although the King should be present in a Court of Justice, he is not entitled to 'determine any cause but by the mouth of his judges, to whom he has committed the whole of his judicial authority.'[3] When James I. sat personally in court, and wished to interfere, he was told by the judges that he could not deliver an opinion.[4]

The Justiciar.

Next to the King in power and authority was his chief minister, the Justiciar, the supreme administrator of law and finance. He was 'the greatest subject in England,' the representative of the King in all matters, and by virtue of his office, lieutenant, viceroy, or regent of the kingdom during the King's absence. The Justiciar was, as we have seen,[5] a new officer appointed by the Conqueror, not only to carry on the government during his frequent absence

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Chron. Jocelin. de Brakelonda, p. 37 (Camden Soc.); Bigelow's Placita Anglo-Normannica, 238.

[1] Allen on the Royal Prerogative, 92; Madox, Hist. of the Exch. i. 191; Dialogus de Scacc. l. i. c. 4; Palgrave, Eng. Com. i. 292. In early times even Queens consort sometimes sat in court. Matilda, in the absence of William the Conqueror, held pleas in person in the County court (Domesday, Heming, p. 512; 'coram Regina Matilda in praesentia iv. vicecomitum'). The 'good Queen Maud,' wife of Henry I., was present at a trial in the Exchequer between the men of Periton and the Abbot of Abingdon ('Quia rex tunc in Normannia erat, regina, quae tunc praesens aderat, taliter hoc sigillo suo confirmavit: Sciatis quod Faritius abbas de Abbendona in curia domini mei et mea apud Wintoniam, in thesauro' &c. (Hist. Mon. Abingd. ii. 116 [Rolls Ser.], Bigelow's Plac. Ang. Norm. 99.) Henry III.'s Queen also held pleas in person (Spence, Equit. Jurisdiction, 101, n.).

[2] Stow, Chron. 416 (1631).

[3] Coke, 4th Inst. 73.

[4] Blackstone, iii. 41.

[5] *Supra*, p. 77.

from England, but at all times to relieve him from the pressure of the vast amount of business which the government of that newly-acquired dominion involved. The Justiciar, in short, stood to the King in the whole kingdom in the same relation as the Sheriff did in each shire.[1] The dignity of the Justiciar's office remained unimpaired until the death of King John, when Hubert de Burgh, the Justiciar, being besieged in Dover Castle, the Barons who proclaimed Henry III. constituted the Earl of Pembroke '*Rector Regis et regni*,' De Burgh still retaining his office. In 1241, the Archbishop of York was appointed Regent during Henry's absence in Poitou, without the title of Justiciar. But the office was still considered of such importance that in 1258, in the 'Mad Parliament' at Oxford, the Barons demanded that the Justiciar should be annually chosen with their approbation. At length Edward I. dispensed with the office altogether; and the Chancellor, who now entered into many of the rights and dignities formerly enjoyed by the Justiciar, became the principal minister.

The Chancellor.

The title of Chancellor was introduced into England under Edward the Confessor, as the designation of the official keeper of the Royal seal and chief of the King's chaplains. With the Chancellor at their head, the King's chaplains, like the 'clerks of the palace' of the Frankish monarchs, formed a select body of scribes or secretaries, who, under the Justiciar, drew up and sealed the Royal writs, conducted the king's correspondence, and assisted the trea-

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[1] Stubbs, Sel. Chart. Introd. Sketch, 16. 'The growth of [the Justiciar's] functions was gradual, and even the history of the title is obscure. . . . . The office first appears as the lieutenancy of the kingdom or vice-royalty exercised during the king's absence from England. In this capacity William Fitz-Osbern the steward of Normandy, and Odo of Bayeux, acted during the Conqueror's visit to the Continent in 1067. . . . . It would seem most probable that William Fitz-Osbern, at least, was left in his character of steward, and that the Norman seneschalship was thus the origin of the English justiciarship.' —Const. Hist. i. 346. [This hardly seems sufficient to account for the Justiciar's position as President of the King's Court, in the King's absence, unless there be evidence, not offered in the passage cited, of a similar position having been filled by the Seneschal of Normandy in the absence of the Duke.—ED.]

surer in keeping the Royal accounts.[1] Under the Norman kings the office of Chancellor, though dignified and important, was thrown into shade by the Justiciarship. From the time of Becket, however, the Chancellorship appears to have steadily advanced in dignity until, on the abolition of the office of Justiciar, it attained, as we have seen, the foremost rank.

The *Curia Regis.*

The term *Curia Regis*, in its widest signification, and early use under William the Conqueror and William Rufus, seems to have denoted the National, Common, or Great Council of the Realm—the Witenagemot in its feudalised form—at the threefold sessions of which the Bishops and Earls and all tenants-in-chief had the right of attending. In addition to its political function of giving 'counsel and consent' to legislative changes and other acts of national import, the Curia, in its Judicial aspect, was invested with the old appellate jurisdiction of the Witenagemot, and with a direct jurisdiction, as the Feudal court of the King's vassals, in all disputes between the tenants *in capite*. From the reign of Henry I. at the latest, the Judicial functions of the Common Council of the Realm appear to have been exercised by a supreme Court of Justice, to which the name *Curia Regis* is specially, though as yet not exclusively, appropriated, and which is attendant upon the King in his movements from place to place.[2] It is presided over by the King, or in his absence by the Justiciar, who was assisted in the performance of his duties by a staff of officials composed of those barons who were attached to the Royal

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[1] Palgrave, Eng. Com. i. 177. 'The name, derived probably from the *cancelli*, or skreen behind which the secretarial work of the royal household was carried on, claims a considerable antiquity; and the offices which it denotes are various in proportion. The chancellor of the Karolingian sovereigns, succeeding to the place of the more ancient *referendarius*, is simply the royal notary: the archi-cancellarius is the chief of a large body of such officers associated under the name of the Chancery, and is the official keeper of the royal seal. It is from this minister that the English chancellor derives his name and function.'—Stubbs, Const. Hist. i. 351—352.

[2] ['With the Norman Conquest,' says Bigelow, *Hist. Proc. in Eng.*, p. 75, 'the king's court proper became a disturbing and an uncertain influence in administration. It appeared furnished with new processes of law, and with claims to jurisdiction of unknown extent.'—ED.]

household, such as the constable, marshal, chamberlain, steward, and treasurer, together with the Chancellor and other persons selected by the King as being specially qualified by their legal knowledge to act as Judges.[1] This Court possessed originally all those different powers which were subsequently distributed among the three courts of the King's Bench, the Common Pleas, and the Exchequer. In the *Curia Regis* were discussed and tried all pleas immediately concerning the King and the realm; it superintended the assessment and collection of the Royal revenue; decided all appeals; and to it suitors were allowed, on payment of a fine, to remove their plaints from the older but inferior Courts of the shire, the hundred, the manor and the borough.[2] The exact relation of the *Curia Regis* thus constituted as a Court of Justice, to the *Curia Regis* in its wide signification as the National Council, is admittedly obscure; nor can we expect to find clearness of definition and limitation at a period when the machinery of government was undergoing a process of transition and development. Practically, however, the King's Court exercised the Judicial powers of a permanent committee of the National Council,[3] consisting mainly of the great officers of

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[1] On the origin of the great officials of the Household and the State, see Stubbs, Const. Hist. i. 343—356.

[2] Hardy, Introduction to Close Rolls, p. 23.

[3] [Bigelow, *Hist. Proc. Eng.*, p. 76, disputes this, saying that the use of the expression Committee of the Witenagemot, or Great Council, for the King's Court is 'so inapt and misleading that no consideration even of convenience should permit its use. A committee is the delegate of the superior body, working for it, and subject to its order and control. The King's Court stood in no such relation to the Great Court [*i.e.*, obviously, the Great Council.—ED.]. It was in no sense the delegate of that court; it was not created by it, and it did not act for it. It was coeval in the (Anglo-Norman) Constitution with the Great Court itself; it had sprung at the same time from the same parentage, the Conquest. . . . In its relation to the Great Court, it was simply a smaller body of great men attendant upon the King, who had their place also in the larger court.' This independent view should be borne in mind, whether acceptable or not to the English student of Mediæval History. Mr. Bigelow does not deny to the King's Court a certain representation, though he deems it but a 'flickering' one, of the A.-S. 'Thegn-men's Court,' which, as he says, was 'enlarging in the time of the Confessor, and must finally have become the most important judicial tribunal of the kingdom, had there been no Conquest.'—ED.]

the King's household, and strengthened by the addition of other officials specially qualified for the position of judge.[1]

Fiscal administration.

The Exchequer.

The administration of the Justiciar was first systematically organised under Henry I., by Roger, Bishop of Salisbury, the founder of a family of officials. From the reign of that King, at the latest, a committee or branch of the *Curia Regis* was specially devoted to fiscal matters, and when so employed, sat in the chamber and was known by the name of the Exchequer (*Curia Regis ad Scaccarium*).[2] Twice in each year, at Easter and Michaelmas, every sheriff was bound to appear at the Exchequer in the Palace at Westminster and account for the sums due from his shire. These were mainly of two kinds (1.) the ancient national payments (which required no new authorisation), consisting of (*a*) the ferm of the shire, that is the rent (formerly paid in kind, now commuted for fixed sums) from public land and Royal demesnes—the old Folkland now become *terra regis*; (*b*) Danegeld, 'the ship-money of those times,' a tax of two shillings on every hide of land, originally imposed under Ethelred II., to raise a tribute exacted by the Danes, and by the Norman Kings turned into a permanent contribution for the public defence;[3] (*c*) the fines of local courts—the old English *wite* payable to the King. (2.) The new Feudal aids, reliefs, and other payments, for which also no authorisation of Parliament was required unless when some extraordinary gift was demanded. In addition to these sources

Sources of revenue.

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[1] Besides being applied to the National Council, and the Supreme Court of Justice, the term *Curia Regis* was also employed to denote the King's Continual, Ordinary, or Select Council.

[2] The members of the Curia were all termed Justices, their head being the *Capitalis Justiciarius*; but in the Exchequer they were called Barones, or *Barones Scaccarii*, a title which they retained after the Court of Exchequer had come to be filled with mere lawyers not chosen from the baronage. Justiciarios ibidem commorantes, says Fleta, barones esse dicimus eo quod suis locis barones sedere solebant.—Hallam, Midd. Ages, ii. [423]. The Exchequer derived its name from the 'chequered cloth which covered the table at which the accounts were taken, a name which suggested to the spectator the idea of a game at chess between the receiver and the payer, the treasurer and the sheriff.' —Stubbs, Const. Hist. i. 377; Dialogus de Scaccario, i. 1.

[3] The latest instance of its payment is in the 20th of Henry II., but Richard I. practically revived it under the disguise of a 'carucage,' or land-tax.

of revenue the demesne lands of the King and the towns were liable to talliage, which was arbitrarily exacted without the consent of Parliament, until the right was surrendered by Edward I.[1] No inconsiderable income was also received by the Exchequer from the fines and other proceeds of the 'pleas of the crown,' from the amercements payable in respect of a large class of small offences of commission or omission, and from the fines paid to the King by the parties to suits at law, either by the plaintiff to obtain speedy judgment, or by the defendant in order to delay or put an end to further proceedings.

Important changes in Taxation under Henry II.

Henry II., the first of the Angevin or Plantagenet dynasty, introduced important changes in Taxation. All classes of the people and all kinds of property were brought under contribution. His Scutage was a new land tax imposed upon the tenants in chivalry, clerical as well as lay, and rated, not upon the ancient basis of the hide, but upon the *scutum*, or knight's fee.[2] Danegeld, after the King's dispute with Becket, was allowed to drop out of the fiscal system, but only to be almost immediately revived under the name of *donum* or hidage. Under Richard I., it became the 'carucage,' a tax levied upon all holders of land of whatever tenure. But Henry's most important innovation was the taxation of income and personal property, which, as we have seen,[3] were made contributory for the first time by his ordinance of the Saladin Tithe in 1188. The practice, when once introduced, was speedily extended and permanently retained. For the

Taxation of personal property.

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[1] Hallam, Midd. Ages, ii. [318]; Stubbs, Select Chart. Introductory Sketch, 18.

[2] On the disputed extent of the Anglo-Saxon 'hide,' see Kemble, Saxons, i. 88 *seq.*, who makes it about thirty-three acres; and G. L. Von Maurer, Einleitung, 126—134. It is agreed that the later hide was one hundred or one hundred and twenty acres. The quantity of land constituting a Knight's fee was not uniform. It probably varied with the value. The usual value requisite for a Knight's fee was £20, *temp.* Edw. I. (Parl. Writs. i. 214), and the amount had probably been the same from the introduction of the tenure. [See also *The Acre and the Hide*, by E. W. Robertson, in *Gent. Mag.*, Dec. 1866, Jan. 1867, Eyton, *Dorset Domesday*, and *Domesday Studies*, vol. i.—ED.]

[3] *Supra*, p. 102.

ransom of Richard I. in 1193, every person in the realm was called upon to pay one-fourth of revenue or goods. King John exacted, in 1203, a seventh of the moveables of his barons, and in 1207 a thirteenth from the whole people.[1]

The pressure of new and systematic taxation excites opposition;

It was only after taxation had been remodelled and systematically extended, under the first Angevin Kings, to all classes of men and all kinds of property, personal as well as real, that any serious opposition, first by the clergy and then by the rest of the nation, begins to make itself felt. In the pre-Norman period the right of the National Council to consent to the imposition of taxes was undisputed, although rarely called into exercise. By the theory of the Feudal System, also, the taxpayer 'made a voluntary offering to relieve the wants of his ruler.' Now that taxation had again become national, and was pressing heavily upon all classes, it became necessary to re-assert the ancient right of the Nation to give its counsel and consent. The process by which the bulk of the feudal vassals exchanged their theoretical right of personal consent for the practical right of granting taxes by their representatives, in an assembly which represented not merely the landowners, but all sections of the Nation, will be discussed later on when treating of the origin and growth of Parliament.

and leads to the re-assertion by the Nation of its ancient right to be taxed only by consent.

Fines *pro respectu militiae* enforced by Edward I.

Edward I. employed an expedient for raising money without the consent of Parliament, analogous to the institution of scutage by Henry II. It was one of the liabilities of a tenant by knight-service to be obliged, on attaining full age, to receive the order of knighthood, and to provide himself with the arms and equipments appropriate to that dignity. Henry III., in 1224, had directed the sheriffs to

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[1] In subsequent times a 'fifteenth' of the value of every man's chattels became the usual grant. From the 8th Edward III. a 'fifteenth' signified a fixed sum according to an assessment of the value made in that year upon all the cities, boroughs, and towns of England. Under Richard II. the old scutage, hidage, and talliage began to be replaced by the 'subsidy,' a property tax of 4*s.* in the pound for land and 2*s.* 8*d.* in the pound for goods. Like the 'fifteenth,' the 'subsidy' also became a fixed amount; one 'subsidy' = £70,000.

enforce this obligation against all lay holders of a knight's fee:[1] an order which was repeated in 1234 as to tenants *in capite* only.[2] In 1278, Edward I., being pressed for funds issued stringent orders to the sheriffs to compel all persons, as well tenants of mesne lords as tenants-in-chief, who held land to the value of £20 a year, or one whole knight's fee of the same annual value, and who ought to be knights, to take up their knighthood.[3] Those who preferred to pay a fine *pro respectu militiae*, were excused. The distraint of knighthood was not merely a method of raising money; it was also intended to effect the military object of augmenting the knightly body from competent freeholders, who were neither tenants-in-chief nor tenants in chivalry, thus forming a link between the Feudal force and the old National militia; and politically it tended to weaken the influence which the baronage derived from the mesne tenures.[4] But the early abuse of this prerogative is shown by the institution in 1274 of an inquiry into the misconduct of the sheriffs and others in reference to the compulsory knighthood,[5] and by the remedial Statute *De Militibus* passed on the accession of Edward II. It was enacted that tenants whose lands produced £20 a year, or who were under age, or in holy orders, or whose lands were held by socage or burgage tenure, should not be compelled to receive knighthood; and that other persons, if of great age, afflicted with bodily injury or incurable disease, or burdened by the charge of children or by suits, should be excused on payment of a *reasonable* fine.[6] This mode of raising money without the consent of Parliament was vexatiously employed in later times by Edward VI., Elizabeth, and Charles I. It was abolished, with the other incidents of Feudal tenure, by the Act of Charles II.[7]

Edward II., statute *De Militibus.*

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[1] Rot. Claus. ii. 69.
[2] Royal Letters [Hen. III.], i. 456.
[3] Palgrave's Parl. Writs, i. 214.
[4] See Stubbs, Const. Hist. ii. 111, 281.
[5] Rymer, i. 517.
[6] 1 Edw. II. stat. 1.
[7] 12 Car. II. c. 24.

Indirect taxation.

Besides the various forms of direct taxation under the Norman and early Angevin kings, the prisage of imported wines and the customs duties on certain other imports and exports (based upon the ancient right of levying toll, which in some places was exercised even by the lords of manors), formed the nucleus of a system of indirect taxation which gradually grew up with the expansion of commerce and the increasing pecuniary necessities of the Crown. The early abuse of the King's claim to customs is shown by the provision in Magna Charta (c. 41), that merchants may buy and sell *sine omnibus malis toltis, per antiquas et rectas consuetudines.* The Constitutional aspect of the later struggles between the King and the Parliament on the subject of indirect taxation will be discussed hereafter.

Judicial system:

Down to the reign of Henry II. the *Curia Regis* still continued as the one Supreme Court, of which some of the Judges, selected from time to time out of the whole body, and varying in number and combination, held a practically continuous session at the Exchequer for all financial business.

Changes in the *Curia Regis* under Henry II.

Under Henry II.—more especially during the decade beginning with the Assize of Clarendon in 1166 and ending with the Assize of Northampton in 1176—the great increase in the business of the *Curia*, both in its central sessions and on its fiscal and judicial circuits, caused the staff of Judges to be gradually augmented to eighteen. But in the year 1178, the King, finding this number too great, reduced the Judges in the *Curia* from eighteen to five (two clerics and three laymen); and at the same time deprived the court of its character of a court of final appeal, by reserving to his own hearing in Council causes in which the *Curia* should fail to do justice.[1] From this limited tribunal,

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[1] Benedict. Abbas, i. 207. Et cum didicisset [rex] quod terra et homines terræ nimis gravati essent ex tanta justitiarum multitudine, quia octodecim erant numero; per consilium sapientium regni sui quinque tantum elegit, duos scilicet clericos et tres laicos: . . . Et statuit quod illi quinque audirent omnes clamores regni, et rectum facerent; et quod a curia regis non recederent, sed ibi ad audiendum clamores hominum remanerent; ita ut si aliqua quæstio

which from the following year held regular sessions *in Banco*, nominally but not actually *coram Rege*, sprang the Courts [now Divisions] of King's [or Queen's] Bench and Common Pleas. Being still, in theory, held *coram Rege*, the *Curia* continued, as of old, to follow the King's person, but this practice being found productive of great inconvenience to both suitors and witnesses, it was provided by Magna Charta that common pleas—civil suits between private individuals—should be separated from the other business of the *Curia* and fixed at Westminster.[1]

Later division into three courts of King's Bench, Common Pleas, and Exchequer.

Not long after the granting of Magna Charta, the *Curia Regis* was permanently divided into three committees or courts, each taking a certain portion of the business: (1) Fiscal matters were confined to the *Exchequer;* (2) Civil disputes, where neither the King's interest nor any matter savouring of a criminal nature was involved, were decided in the *Common Pleas;* and (3) the court of *King's Bench* retained all the remaining business and soon acquired the exclusive denomination of the ancient *Curia Regis*.[2] But the same staff of Judges was still retained for all three courts, with the Chief Justiciar at their head. Towards the end of Henry III.'s reign, the three courts received each a distinct staff, and on the abolition by Edward I. of the office of Chief Justiciar, the only remaining bond of union being severed, they became completely separated.[3] Some

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inter eos veniret, quæ per eos ad finem duci non posset, auditui regio præsentaretur et sicut ei et sapientioribus regni placeret terminaretur. [*s.a.* 1178.]

[1] Mag. Chart. c. 17, *supra*, p. 121.

[2] The somewhat confusing employment of the term *Curia Regis* down to the time when it became exclusively appropriated to the Court of King's Bench, is referred to by Hallam (M. A. ii. 423), and should be borne in mind. It was used to denote: (1) The *Commune Concilium*, or National Council of the Realm, the Witenagemot in a feudalised form: (2) The *Ordinarium Concilium*, the continual or select council for judicial as well as administrative purposes: (3) The *Court of King's Bench*, springing from the limited tribunal separated from this last by Henry II. in 1178, and soon after acquiring exclusively the denomination *Curia Regis*.

[3] From an early period after their complete severance, the King's Bench, Common Pleas, and Exchequer resorted to various contrivances to enlarge the jurisdiction of their respective courts. The King's Bench always had cognisance of all personal actions where the defendant was already under the custody of that court. By a legal fiction persons not actually in custody of the marshal of the court were assumed so to be, in order to bring them within its juris-

trace of their ancient unity of organisation always survived, however, in the Court of Exchequer Chamber;[1] until at length after six centuries of independent existence they were again united by the Judicature Act, 1873.[2] Together with the Court of Chancery and the Probate, Divorce, and Admiralty Courts, they now form Divisions of a consolidated High Court of Justice, itself a branch of the Supreme Court of Judicature.

Itinerant Justices established by Henry II.

The system of Itinerant Justices, or Justices in Eyre (= *in itinere*) was not invented by Henry II., but its establishment as an organised and permanent institution is due to him. As early as the reign of Henry I., some of the justices of the *Curia Regis* were occasionally appointed by

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diction; and by a similar legal fiction the Court of Exchequer, though by its constitution precluded from hearing common pleas, gained cognisance of them by allowing the plaintiff to allege that he was a debtor to the Crown and then to invoke the aid of the court to recover from the defendant what would enable him to pay his debt to the Crown. So long as the Judges received profit from fees, they had a direct interest in drawing business each to his own court; and the legal maxim *boni judicis est ampliare jurisdictionem* seemed capable of a somewhat mercenary interpretation. The statutes 2 Will. IV. c. 39, and 2 Vict. c. 110, at length put an end to these fictions, and established one form of process—the writ of summons—for all the courts.

[1] The Court of Exchequer Chamber existed down to the passing of the Judicature Act, 1873, under two forms:

(1) As a *court of mere debate*, into which causes of great weight and difficulty might be adjourned, before judgment was given upon them in the court below (as was done in *Calvin's* case, 2 St. Tr. 559). The court was then composed of all the Judges of the three superior Courts, and sometimes the Lord Chancellor also.

(2) As a *Court of Error*:

(*a*) First created by statute 31 Edw. III. c. 12, to determine errors from the common law side of the Court of Exchequer. Composed of the Lord Chancellor, and Lord Treasurer, and the Justices of the King's Bench and Common Pleas.

(*b*) A second Court of Exchequer Chamber was erected by statute 27 Eliz. c. 8, to determine writs of error from the King's Bench. Composed of the Justices of the Common Pleas and the Barons of the Exchequer.

Both (*a*) and (*b*) were abolished, and

(*c*) The *court was reconstituted* by 11 Geo. IV. & 1 Will. IV. c. 70, s. 8. Judgments of each of the superior Courts of Common Law (upon proceedings in error in law being instituted) were subject to revision by the Judges of the other two Courts sitting collectively as a Court of Error in the Exchequer Chamber.

(See Stephen, Commentaries, iii. 428.) By the Supreme Court of Judicature Act, 1873, the jurisdiction of the Court of Exchequer Chamber was merged in that of the new Court of Appeal.

[2] 36 & 37 Vict. c. 66.

the King to go from county to county to collect the revenue and hold pleas, civil and criminal.[1] Their chief duty, originally, was to collect the revenue, determine disputes as to the amounts payable, and detect and punish frauds on the part of the sheriffs and other fiscal officers.[2] But they also supplied the place both of the old English Royal progresses, during which the kings had been wont to hear and determine complaints of failure of justice in the lower tribunals, and of the annual courts which the Conqueror and his two sons held *de more* at Gloucester, Winchester, and Westminster, on the three great festivals of the year. During the anarchy of Stephen's reign the provincial visitations had ceased; but Henry II. restored the practice. The instructions contained in the Assize of Clarendon in 1166 are evidently intended for the guidance of a body of itinerant Justices who were about to visit each county, and in conjunction with the Sheriffs, try all offenders accused by the Jury of Presentment.[3] In 1176, at the Great Council of Northamptom, Henry divided the kingdom for fiscal and judicial purposes into six circuits, to each of which three itinerant Judges were assigned.[4] By the Magna Charta of John (c. 18) two Justices were to be sent into each county four times a year, to take assizes of mort d'ancestor, novel disseisin, and darrein presentment; but in the second reissue of the Charter by Henry III., in 1217, this was altered (c. 13), to one annual visitation. Shortly afterwards the Justices appear, for general purposes, to have made their

Regular Circuits formed, 1176.

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[1] Hardy, Introduction to Close Rolls, p. xxiv. n.

[2] The Itinerant Justices long continued to be employed as the King's agents for squeezing money out of the people. In a Great Council convened by Henry III. in 1242, the baronage complained—Non cessaverunt justitiarii itinerantes itinerare per omnes partes Angliae tam de placitis forestae quam de omnibus aliis placitis, ita quod omnes comitatus Angliae et omnia hundreda, civitates et burgi, et fere omnes villae graviter amerciantur; unde solummodo de illo itinere habet dominus rex vel habere debet maximam summam pecuniae, si persolvatur et bene colligatur. Unde bene dicunt quod per illa amerciamenta et per alia auxilia prius data, omnes de regno ita gravantur et depauperantur quod parum aut nihil habent in bonis.—Matt. Paris. 582.

[3] Select Chart. 134.

[4] Ben. Abb., i. 107; Dial. de Scacc. ii. c. 2 [*secuit regnum in sex partes*].

circuit round the kingdom once in seven years only; a practice which was continued till the reign of Edward I.

Judges of Assize and Nisi Prius.

By the statute of Westminster II. (13 Edw. I. c. 30), Judges of Assize and Nisi Prius were ordered to be assigned out of the King's sworn justices, associating to themselves two discreet knights of each county, to try matters of fact at the courts of Assize and Nisi Prius. These justices of assize superseded the old justices in Eyre, and have continued to the present day.[1]

From their first institution the Itinerant Justices were accustomed on circuit to sit in the full County Court, which was summoned to meet them. Their provincial visitations thus form 'the link between the Curia Regis and the Shire-moot, between royal and popular justice, between the old system and the new.'[2] This direct connection between the court of the King and the court of the Shire had most important Constitutional effects, hereafter to be noticed, on the growth of the national representative assembly; and to the same cause is mainly due both the uniformity of our Common Law, and the repression within due limits of the local Feudal jurisdictions.[3]

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[1] Provincial justice has always been administered under a variety of distinct authorizations, corresponding to the several commissions of the judges. Blackstone (iii. 60) describes the judges of Assize as sitting under five commissions; (1) of the peace; (2) of oyer and terminer; (3) of gaol delivery; (4) of assize; (5) of nisi prius. The recent abolition of actions of assize and other real actions has, however, thrown the commission of assize, as distinguished from that of nisi prius, out of force, so that there are now only four commissions.

[2] Stubbs, Const. Hist. i. 605.

[3] The shire-moot summoned to meet the Itinerant Judges was a much more complete representation of the county than the ordinary county court, which at some period between the reigns of Henry I. and Henry III. began to be held once a month, like the court of the hundred, instead of only twice a year as formerly. 'The great franchises, liberties, and manors which by their tenure were exempted from shire-moot and hundred were, before these visitors, on equal terms with the freeholders of the geldable, as the portion of the county was called which had not fallen into the franchises. Not even the tenants of a great escheat in the royal hands escaped the obligation to attend their visitation. . . . A writ of Henry III., issued in 1231, directs the summons to the county court to be addressed to "archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders; four men of each township, and twelve burghers of each borough, to meet the justices."'—Stubbs, Const. Hist. i. p. 607 [and *n.* 3, *ib.*].

Trial by Jury.

To Henry II.[1] must also be ascribed, in addition to his other legal reforms, the wide expansion and regular establishment of the system of Recognition by Sworn Inquest, that is, the finding of facts by the oath of a body of impartial witnesses, who represent the testimony of the local community, and are summoned and examined by an official acting under the King's writ. From this institution our modern Trial by Jury is lineally descended.

Its origin.

The origin of this 'most democratical of juridical institutions,' the cherished bulwark of Constitutional liberty, has been the subject of much learned discussion, and of numerous conflicting theories.[2] Many eminent writers, including the learned author of the 'History of Trial by Jury,' have stoutly maintained that the English jury is of indigenous growth, and was not derived, directly or indirectly, from any of the tribunals that existed on the Continent.[3] Some have contended for its ancient British or Romano-British origin.[4] By others the Anglo-Saxon compurgators (or sworn witnesses to credibility), the sworn witnesses to facts, the *frithborh*, the twelve senior thegns of Ethelred's law who were sworn to accuse none falsely, the system of trial in local courts by the whole body of the Shire or Hundred, have all been regarded as containing, severally or in combination, the germ of the modern Jury. Yet, with the exception of what may be termed Ethelred's

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[1] 'The acts of the counsellor are frequently ascribed to the sovereign; but the encomiast and the detractor both agree in ascribing the "assizes" enacted by Henry to the bent of his own mind.'—Palgrave, Eng. Com. i. 243.

[2] See Forsyth, Hist. of Trial by Jury; Bourguignon, Mémoire sur le Jury, (who despairingly says, 'son origine se perd dans la nuit des temps'), Palgrave, English Commonwealth, i. ch. 8; Turner, Hist. Anglo-Saxons; Reeves, Hist. Eng. Law (ed. Finlason); Meyer, Orig. et Progrès des Inst. Judic. ii. c. 11; Gneist, Self-Government, i. 74, sq.; K. Maurer, in the Kritische Ueberschau, v. 180, 332, sq.; Brunner, Entstehung der Schwurgerichte; Stubbs, Const. Hist. i. 395, 608–623; [and Glasson, *Hist. du Droit et des Inst. de l'Angleterre*, iii. 409–414. M. Glasson shows that the *judicium parium* was claimed as a common law right in France under Louis VIII., and also notes the salient difference between the Jurors of English Law and the *Jurati* of the Assises de Jérusalem, who have by some been claimed as their prototype.—ED.]

[3] Forsyth, Trial by Jury, p. 13.

[4] Philipps on Juries; Probert, Ancient Laws of Cambria; Finlason's Reeves' Hist. of English Law.

Jury of Presentment (which will be considered in connexion with the Grand Jury of later times), not one of these supposed *origines* will be found, on careful examination, to possess much more than a superficial analogy to the Inquest by Sworn Recognitors, the historic progenitor of the existing Jury. The theory which presents the fewest *à priori* difficulties, and which is supported by arguments and evidence only falling short of actual demonstration, regards the English system of sworn inquests as an importation from Normandy. There, both before and after the cession of the Neustrian province to Rollo by Charles the Simple, it had existed, as in the rest of France, from its establishment under the Carolingian Kings, whose Capitularies contain minute instructions for inquisitions by sworn witnesses in the local courts.[1] But whatever may be the remote source of this institution, out of which Trial by Jury grew—a question after all chiefly of antiquarian interest—whether we regard the institution as a modification of the old English Judicial system, or, with far greater reason, as an inheritance derived through the Normans from the Carolingian Kings, two points are in any case clear: (1) The system of Inquest by Sworn Recognitors, even in its rudest and simplest form, appears for the first time in England subsequently to and shortly after the Norman Conquest. (2) This system was in England, from the first, worked in close combination with the previously existing procedure of the shire-moot;[2]

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[1] See Palgrave, English Commonwealth, i. ch. 8; Brunner, Entstehung der Schwurgerichte, who traces the inquest by jury, both Norman and English, from the Carolingian Inquisitiones; and Stubbs (Const. Hist. i. 612–614, *n.* 1), who, adopting in the main the theory of Palgrave corrected and adjusted by the recent work of Dr. Brunner, says: 'The truth seems to be that the inquest by sworn recognitors is directly derived from the Frank Capitularies, into which it may have been adopted from the fiscal regulations of the Theodosian Code, and thus own some distant relationship with the Roman jurisprudence. . . . . The continuance of the system in France from the Karolingian times and through the Norman period is proved by Dr. Brunner in his work (Entstehung der Schwurgerichte). The most curious phaenomena [*sic*] in connexion with it is the fact that it was only on English soil that it gained much development, the Norman lawyers seeing themselves rapidly outstripped by those of England, and the institution withering away in the rest of France until it became extinct.'

[2] See the celebrated trials in the reign of William the Conqueror between

and in its developed form of 'Trial by Jury' is distinctly and exclusively an English institution.[1]

The twelve thegns in the hundred-moot, a jury of present-ment of criminals.

As regards Criminal trials, we do indeed meet in the ordinance of King Ethelred II. (*flor.* 978–1016) with a species of jury of accusation clearly analogous to our *Grand* Jury, and possibly its direct progenitor. In the gemot of every hundred or wapentake the twelve senior thegns, with the reeve, were directed to go apart and accuse, or as we should say, present, on oath, all whom they should believe to have committed any crime.[2] The twelve thegns seem to have performed the part of public prosecutors; but the fact of the guilt or innocence of the accused person had still to be determined by compurgation, or the ordeal. This primitive Grand Jury probably continued in use, after the Conquest, until its reconstitution by Henry II.,[3] and thus the Criminal jury, although, doubtless, largely influenced in its later development by the co-existence of the inquest by jury in Civil matters, possesses strong claims to a purely indigenous origin.

Growth of the Jury in civil cases.

For more than a hundred years after the Conquest the ancient Anglo-Saxon modes of trial, or forms of proof, by ordeal (*judicium Dei*), by oath (compurgation, termed

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Lanfranc, Archbishop of Canterbury, and Odo, Bishop of Bayeux, on Pennenden Heath (Ang. Sacra, i. 334–336); and between Gundulf, Bishop of Rochester, and Picot, Sheriff of Cambridgeshire (*Ib.* i. 339). [Cf. Bigelow, *Plac. Ang.-Norm.*, 4, 34.—ED.]

[1] [Bigelow, *Hist. of Procedure in Eng.*, p. 334, calls the modern jury a 'purely Norman-English' institution, and says that 'the essential features of the modern jury were in fact nearly consummated in the recognitions.'—ED.]

[2] 'This is the ordinance which King Ethelred and his Witan ordained as "frith-bot" for the whole nation, at Woodstock, in the land of the Mercians, according to the law of the English. . . . III. cap. 3. . . . And that a gemot be held in every wapontake; and the xii. senior thegns go out, and the reeve with them, and swear on the relic which is given them in hand, that they will accuse no innocent man, nor conceal any guilty one.' Thorpe, Anc. Laws and Inst.; Select Chart. 71–2.

[3] Ang.-Sax. Chron. ann. 1124. . . . 'After S. Andrew's mass, before Christmas, Ralph Basset [justiciar] *and the king's thegns* held a "gewitenemot" at Hundehoge [Huncot] in Leicestershire, and there hanged so many thieves as never were before, that was in that little while, altogether four and forty men.' [This is said by Bigelow, *Hist. Proc. Eng.*, 24, to be 'one of the latest mentions of the witenagemot by that name.'—ED.] The Pipe Roll of 31 Hen. I. contains numerous references to the *judices* and *juratores* of the shire and hundred courts. Under one or the other of these names the jury of presentment may probably have been indicated.

later on 'wager of law'), by witnesses, and by production of charters, continued in general use, side by side with the Norman procedure, the wager of battle—an innovation detested by the English,[1] and at length gladly laid aside by the Normans themselves,—and the occasional use of the Inquest by sworn recognitors. It was only gradually, however, that the advantages of the principle of recognition by jury in its application to judicial procedure became impressed upon the minds of both rulers and ruled. At first the sworn inquest seems to have been chiefly applied to matters not judicial, such as the ascertainment of the laws of King Edward,[2] the Domesday survey,[3] the assessment of feudal taxation under William Rufus and Henry I., and the customs of the Church of York, which the latter monarch, in 1106, directed five commissioners to verify by the oath of twelve of the citizens.[4] There are, however, equally early instances of strictly legal matters being decided by the recognition on oath of a certain number of *probi et legales homines*, selected from the men of the county to represent the neighbourhood and testify to facts of which they had special knowledge. In a suit as to certain lands of the Church of Ely, the Conqueror directed his justiciars to assemble the shire-moots[5] of the shires in which the possessions of the Abbey of Ely lay, and ascertain the truth by the oath of a number of English to be chosen for their knowledge of the state of the lands in the time of King Edward.[6] A like proceeding is directed with reference to the rights of the monks of

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[1] [As to this alleged English detestation, see *contra*, Bigelow, *Hist. of Proc. Eng.*, p. 327, and the case there cited, where an Englishman, Bp. Wulfstan, was plaintiff so soon after the Conquest as *circa* 1077.—ED.].

[2] *Supra*, p. 72.

[3] *Supra*, p. 60.

[4] Thoroton, Nottinghamshire, iii. 77; Stubbs, Const. Hist. i. 611.

[5] [*Omnes scyras* is the expression in the Writ. Bigelow, *Plac. Ang.-Norm.*, 24.—ED.]

[6] Eligantur plures de illis Anglis qui sciunt quomodo terræ jacebant praefatæ ecclesiæ die qua rex Edwardus obiit, et quod inde dixerint ibidem jurando testentur.—Liber Eliensis, 256. [Bigelow, *Plac. Ang.-Norm.*, 24.—ED.]

Ramsey in an extant writ of William Rufus directed to the Sheriff of Northamptonshire.[1] One of the most marked of these early instances of the *probi vicini* being summoned as a jury for judicial purposes occurs in the reign of Henry I. A writ was addressed in the name of William the Atheling to the Sheriff of Kent, requiring him to summon 'Hamo the son of Vital, and the *probi vicini* of Sandwich whom Hamo has named, to say the truth' respecting the freedom from toll of a vessel belonging to the Abbot of St. Augustine's, which seems to have been seized for non-payment of dues. By a subsequent writ the sheriff was directed to restore the vessel to the abbot, according to the verdict or recognition of the good men of the county (*sicut recognitum fuit per probos homines comitatus*).[2] Henry II. applied recognition by jury to every description of business, fiscal and legal, and henceforth down to the reign of Edward I. it was, in particular, the most usual machinery employed for the assessment of taxation.[3]

Earliest mention of a jury in statute law, Constitutions of Clarendon, 1164.

The use of a Jury, both for criminal presentment and civil inquest, is mentioned for the first time in our statute law in the Constitutions of Clarendon. The way in which the jury is therein referred to seems to imply that it had already grown into general use and favour. When no one could be found to accuse a powerful layman amenable to the Bishop's jurisdiction, the sheriffs, at the Bishop's request, were directed to 'swear twelve lawful men of the neighbourhood to tell the truth, according to their conscience,' and the same statute declared that 'by the recognition of twelve lawful men,' the Chief Justice should decide all disputes as to the lay or clerical tenure of land.[4]

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[1] Palgrave, Eng. Com. (Proofs), clxxix.

[2] Hist. Mon. S. August. pp. 353–4; Palgrave, *ubi sup.*; Forsyth, Trial by Jury, 104.

[3] The variations in the mode of assessing taxation during this period and the increasing use of the jury for that purpose, are traced by Bp. Stubbs, Select Chart. pp. 147, 251, 275, 342, 345, 351, 357. By the Great Charter of John, sec. 20, amercements were only to be imposed 'per sacramentum proborum hominum de visneto.'

[4] *Supra*, p. 99.

Henry II.'s Grand Assize.

It was in the Grand Assize[1] (the exact date of which is unknown[2]) that the principle of recognition by jury, having gradually grown into familiar use in various civil matters, was applied by Henry II., in an expanded and technical form, to the decision of suits to try the right to land. It is described by Glanvill as a Royal boon conferred on the people, with the counsel and consent of the *proceres*, to relieve freeholders from the hardship of defending the title to their lands by the doubtful issue of trial by battle.[3] By the Grand Assize the defendant was allowed his choice between wager of battle and the recognition (*i.e.*, knowledge) of a jury of twelve sworn knights of the vicinage summoned for that purpose by the sheriff.

Procedure.

Other Assizes.

In actions not seeking to determine the absolute right to land, but dealing with the seisin only (of which the 'assize of novel disseisin' was the most important), the sheriff himself chose twelve knights or freeholders (*legales homines*) of the vicinage, who were sworn to try the question. In both

The Jury were *witnesses*.

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[1] Assisa = Statute or Ordinance. The recognition by jurors was called an assize because it was established by an Assisa or statute of Henry II., the text of which, however, has not been preserved. It seems to have been called 'Magna' from the importance of the questions to be decided under it and the superior station of the 'milites' who were to compose the jury. The 'milites' were not always actual knights, but they must have possessed landed property sufficient to render them legally compellable to take the degree of knighthood or pay a fine. In ancient times the word 'miles' was in fact almost synonymous with 'gentleman' now.—Forsyth, Trial by Jury, 453. [Some of these statements taken from Mr. Forsyth appear to be of doubtful accuracy. In mediæval charters the *milites* are always carefully distinguished by their proper description, and separated from other witnesses in the test clause, and it is apprehended that no *armiger* would find place among them, still less a *generosus*, if that epithet can be traced sufficiently far back to be considered. *Per contra*, it is within the Editor's knowledge that so eminent a peerage lawyer and genealogist as John Riddell, in an opinion on a peerage claim, laid great stress on the value of the description, *miles*, in charters of David II., as occurring at a time when knighthood was a high distinction. That it ever sank so low as to be 'almost synonymous' with the extremely vague modern term 'gentleman,' seems to the Editor to be a suggestion devoid of support from mediæval documentary evidence.—ED.]

[2] [For the suggestion of the Peace of Wallingford as the probable date, and the Clergy as the originators of the Grand Assize, see Bigelow, *Hist. of Procedure in Eng.*, p. 175, *n.* 2.—ED.].

[3] Est autem Magna Assisa regale quoddam beneficium, clementia principis de consilio procerum populis indultum, quo vitae hominum et status integritati tam salubriter consulitur, *ut in jure quod quis in libero soli tenemento possidet retinendo duelli casum declinare possint homines ambiguum.*—Glanvill, De Legibus Angliae, lib. ii. c. 7.

cases the recognitors were sworn to found their verdict upon their own knowledge, gained either by eye-witness or by the words of their fathers, or by such words as they are bound to have as much confidence in as if they were their own.[1] The proceeding by assize was in fact merely the sworn testimony of a certain number of persons summoned to give evidence upon matters within their own knowledge. They were themselves the only witnesses. If all were ignorant of the facts, a fresh jury had to be summoned; if some of them only were ignorant, or if they could not agree, others were to be added—a process subsequently called *afforcing* the jury—until a verdict could be obtained from twelve unanimous witnesses.[2]

Afforcing the Jury.

The remedy by Assize was subsequently improved by several Acts of Parliament, particularly 13 Ed. I. c. 25; and as all actions on the assize were tried in the King's Court or in that of the Justices Itinerant, the jurisdiction of the County and Hundred Courts began, from this period, rapidly to decline.

Growth of the Jury in criminal cases: Assize of Clarendon, 1166.

By the Assize of Clarendon the principle of Recognition by jury was extended to Criminal cases. It was ordained that in every county twelve lawful men of each hundred, with four lawful men from each township, should be sworn to present all reputed criminals of their district in each County court. The persons so presented were to be at once seized and sent to the water ordeal.[3] This was simply a

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[1] Ad scientiam autem eorum qui super hoc jurant inde habendam, exigitur quod per proprium visum suum et auditum illius rei habuerint notitiam, vel per verba patrum suorum et per talia quibus fidem teneantur habere ut propriis.—Glanvill, ii. c. 17.

[2] *Ibid.*: Bracton, lib. iv. c. 19. An example of the whole jury being ignorant of the facts, and of the summons of a fresh one in consequence, occurs in Placit. Abbrev. 11; Wiltesir: Assisa venit recognitura si Adam de Greinvill et Willielmus de la Folie dissaisaverunt injuste et sine judicio Willielmum de Weston de libero tenemento suo in Suto post primam coronationem Domini Regis. Juratores dicunt quod *non viderunt* unquam alium saisitum de tenemento illo nisi Willielmum de la Folie, *et quod nesciunt si Willielmus de la Folie dissaisissset eum vel non.* Consideratum est quod *alii juratores eligantur qui melius sciant rei veritatem.* Dies datus est eis ad diem Mercurii.

[3] Assize of Clarendon, Select Chart. 137. Even those who successfully passed through the ordeal were to abjure the kingdom within eight days, as being of evil character by the testimony of the neighbourhood.

reconstitution or revival, in an expanded form, of the old English institution analogous to a Grand Jury, which, as we have seen, had existed at least since the time of King Ethelred II.

Richard I., Articles of Visitation, 1194.

By the Articles of Visitation issued under Richard I. in 1194, as instructions to the Itinerant Justices, the election and constitution of the Jury of Presentment established by Henry II. was further regulated, and assimilated to the system already in use for nominating the recognitors of the Grand Assize.[1] From this developed Jury of Presentment our present Grand Jury has historically descended.[2]

The Grand Jury.

Compurgation dies out.

The establishment of this system of combined presentment and ordeal had the effect of abolishing, in all criminal cases, the ancient practice of compurgation by the oath of friends, 'the manifest fountain of unblushing perjury.'[3]

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[1] *Forma procedendi in placitis Coronae Regis.* In primis eligendi sunt quatuor milites de toto comitatu, qui per sacramentum suum eligant duos legales milites de quolibet Hundredo vel Wapentacco, et illi duo eligant super sacramentum suum x. milites de singulis Hundredis vel Wapentaccis; vel, si milites defuerint, legales et liberos homines, ita quod illi xii. in simul respondeant de omnibus capitulis de toto Hundredo vel Wapentacco.—Hoveden, iii. 262; Select Chart. 251.

[2] In the course of time the element of popular election in the mode of nominating the Grand Jury was entirely eliminated. Under the present Grand Jury system twenty-four freeholders of the county are summoned by the sheriff. Of these, a certain number, varying from twelve to twenty-three, are sworn, and having been previously instructed in the articles of inquiry by a 'charge' from the Judge, withdraw to examine indictments and hear privately the evidence for the prosecution only. If twelve are satisfied of the truth of the accusation, the Grand Jury find 'a true bill' and the prisoner is then put on his trial in open court before a Judge and twelve petit jurymen. If not satisfied, the Grand Jury find 'no true bill.' This is termed 'ignoring' the bill, from the word 'ignoramus,' which was formerly endorsed on it. A famous historic case of 'ignoramus' occurred on the trial of Lord Shaftesbury for high treason in 1681, when the Grand Jury of London ignored the bill.—State Tr. viii. 768. A more recent case, arising out of the Jamaica rebellion, was the ignoring the indictment for murder against Governor Eyre.

[3] In boroughs, (whose charters exempted them from the jurisdiction of the county court,) compurgation was retained some time longer. In the civil action of debt, it lingered on to a recent period. The defendant, in an action of debt, was allowed 'to wage his law,' that is, to deny upon oath the debt, and vouch eleven compurgators in support of his credibility. The consequence of this was that plaintiffs avoided, when they could, that form of action, for as Sir Edward Coke says of his own time, 'Men's consciences do grow so large (specially in this case passing with impunity) as they choose rather to bring an action upon the case upon his (the defendant's) promise, wherein (because it is *trespass sur le case*) he cannot wage his law, than an action of

In the year 1215, the ordeal was abolished throughout [Western Europe] by the fourth Lateran Council;[1] and there remained only, for criminal trials in England, the Grand Jury and the Combat. But the Combat was not applicable unless an injured prosecutor, or 'appellant,' came forward to demand it; and as the Grand Jury was found inadequate to secure perfect justice, the practice (which had been introduced even before the abolition of ordeal) gradually grew up of allowing a second, or Petit Jury to affirm, or traverse, the testimony of the first set of inquest-men. This became the general usage in the reign of Henry III. Still for a long time no prisoner was compellable to plead, that is, he might refuse to be tried by the jury: but in this case he was remanded to prison, and from the date of the Statute of Westminster I. (3 Edward I.) was liable to the barbarous punishment called *peine forte et dure*, which was only abolished so late as the reign of George III.[2]

Ordeal abolished.

The combat not generally applicable.

Petit jury introduced.

Peine forte et dure.

It is important to bear in mind that in Trial by Jury as permanently established, both in Civil and Criminal cases, by Henry II., the function of the Jury long continued very different from that of the modern tribunal. The jurymen were still mere recognitors, deciding simply on their own knowledge or from tradition, and not upon evidence produced before them; and it was for this reason that they were always selected from the hundred or vicinage in which the question arose.[3]

Difference between the ancient and modern Jury.

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debt.'—Co. Lit. 295, b. The defendant himself was sworn *de fidelitate*, and the eleven compurgators *de credulitate* (Forsyth, 82). Wager of law was abolished, in 1883, by 3 & 4 Will. IV. c. 42, s. 13.

[1] [For reasons already given, it is submitted that although, practically, the Lateran canon on this subject may have been allowed force by the Civil Government, as a measure of utility, the canon itself can have had no validity in Law, though its violation might have been good ground for excommunication in the Ecclesiastical Courts.—Ed.]

[2] 12 Geo. III. c. 20. For an account of the *peine forte et dure*, see Palgrave, Eng. Comm., (Proofs) clxxxix. Stephen, Comm. iv. 476, [and Bigelow, *Hist. Eng. Proc.*, 324.—Ed.].

[3] 'Trial by jury, according to the old English law, was a proceeding essentially different from the modern tribunal, still bearing the same name, by which it has been replaced; and whatever merits belonged to the original mode of judicial investigation—and they were great and unquestionable, though accompanied by many imperfections—such benefits are not to be exactly identified

Later development of the Jury.

The later development, common to the Civil and Criminal Jury alike, by which the jurors gradually changed from witnesses into judges of fact, the proof of which rested exclusively on the evidence of others, has now to be considered. The number of the recognitors was at first undefined, but when Glanvill wrote, under Henry II., twelve appears to have been the usual, though not the invariable, number mentioned in the King's writs. We have seen that it was necessary that twelve jurymen should concur in their verdict, and this result, in Civil cases at least, was procured by 'afforcing' the jury, that is, adding other recognitors from the vicinage who were acquainted with the matter. But the difficulty of procuring a verdict of twelve, caused for a time the verdict of a majority to be received. In the reign of Edward III., however, the necessity for a unanimous verdict of twelve was re-established.[1]

Unanimity of Jury.

Special witnesses summoned as part of the Jury, *temp.* Hen. III.

Under Henry III. special witnesses (such as the witnesses to a deed) were sometimes summoned together with, and formed part of, the Jury.

Witnesses distinct from Jury, 23 Edw. III.

In the Year Books of 23rd Edward III. mention is made of witnesses being adjoined to the Jury to give them their testimony, but without having any voice in the verdict. This is the first indication of the Jury deciding on evidence

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with the advantages now resulting from the great bulwark of English liberty. Jurymen in the present day are triers of the issue: they are individuals who found their opinion upon the evidence, whether oral or written, adduced before them; and the verdict delivered by them is their declaration of the judgment which they have formed. But the ancient jurymen were not impanelled to examine into the credibility of the evidence: the question was not discussed and argued before them: they, the jurymen, were the witnesses themselves, and the verdict was substantially the examination of these witnesses, who of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question to the best of their belief. In its primitive form a trial by jury was therefore only a trial by witnesses; and jurymen were distinguished from any other witnesses only by customs which imposed upon them the obligation of an oath and regulated their number, and which prescribed their rank and defined the territorial qualifications from whence they obtained their degree and influence in society.'—Palgrave, *op. cit.*, i. 243.

[1] [Bigelow, *Hist. Proc. Eng.*, 5, 259, citing Glanvill's testimony at both places, thinks that in the Recognitions, 'judging from the analogy of compurgation and witnesses, . . . if there was not at least a substantial agreement in the truth of the allegation of the party who had sought the recognition, his case must have failed.'—ED.]

formally produced in addition to their own knowledge, and forms *the connecting link between the ancient and the modern Jury.*[1]

Temp. Hen. IV. evidence given at the bar of the court.

Early in the reign of Henry IV. a further advance was made. All evidence was required to be given at the bar of the court, so that the Judges might be enabled to exclude improper testimony.[2]

Consequences of this.

From this change flowed two important consequences: (1) From the exercise of control on the part of the Judges sprang up the whole system of rules as to Evidence. (2) The practice of receiving evidence openly at the bar of the Court produced a great extension of the duty of an advocate. Henceforward 'witnesses were examined and cross-examined in open court; the flood-gates of forensic eloquence were opened, and full scope given to the advocate to exercise his ingenuity and powers of persuasion on the jurors, to whose discretion the power of judging on matters of fact were now entrusted.'[3]

Temp. Hen. VI. the Jury nearly the same as at present:

In the treatise of Chief Justice Fortescue, 'De Laudibus Legum Angliae,' written soon after the year 1450, we have clear evidence that the mode of procedure before juries by vivâ voce evidence was the same as at present.[4]

But still entitled to rely on their own knowledge:

But Juries were still for a long time entitled to rely on their own knowledge in addition to the evidence. In the first year of Queen Anne, the Court of Queen's Bench decided that if a Jury gave a verdict of their own knowledge, they ought so to inform the Court, that they might be sworn as witnesses. This, and a subsequent case in the reign of George I., at length put an end to all remains of the ancient functions of Juries as recognitors.[5]

down to reign of George I.

Rule as to Venue.

In the same way the ancient rule requiring jurors to

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[1] Spence, Eq. Juris. i. 129.

[2] In a reported case of 11 Hen. IV., a verdict was set aside because the Jury, on retiring to consider their verdict, had taken with them an escrow which had *not been proved in evidence at the bar by the party, nor delivered to them by the Court.* Starkie, Trial by Jury, (*Law Review*, No. iv., Aug. 1845, p. 397).

[3] Starkie, Trial by Jury, (*Law Review*, No. iv., Aug. 1845.)

[4] Fortescue, De Laud. Leg. Ang. c. 26; Hallam, Midd. Ages, ii. [400].

[5] Spence, Eq. Juris. i. 130.

be returned from the vicinage or hundred, which arose when jurymen were themselves the witnesses, was, after various modifications, abolished in all Civil actions in the reign of George II.,[1] and it was directed that juries should be summoned from the body of the county.

Writ of Attaint.

While the jurymen were mere recognitors, or witnesses, if they gave a wrong verdict, they must usually have been guilty of perjury. Hence, at Common Law, they became liable to the writ of attaint, which, in the time of Henry II., was restricted to pleas of assize only (novel disseisin, &c.), but was afterwards, by various statutes, extended to 'every plea, real as well as personal.'[2]

In attaint the cause was tried again by a Jury of twenty-four. If the verdict of the second Jury was opposed to that of the first, the original twelve jurors were arrested and imprisoned, their lands and chattels were forfeited to the King, and they became for the future infamous. At a later period other severities were added to the sentence.[3]

After the Jury became distinct from the witnesses, attaint gradually fell into disuse. Sir Thomas Smith, in 1583, says attaints were 'very seldom put into use.'[4] In 1757, Lord Mansfield said 'the writ of attaint is now a mere sound in every case;'[5] but it was not legally abolished till the reign of George IV.[6]

Abolished Geo. IV.

Its object effected by a new trial.

Long before the legislative abolition of attaint, the important object which that proceeding indirectly attained—a review of the first verdict—had been otherwise secured, in practice, by the motion for a new trial and rule thereupon granted, the first recorded instance of which occurred in the year 1665.[7]

Juries fined and imprisoned.

Besides the legal method of attaint, there was also

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[1] 4 & 5 Anne, c. 16, and 24 Geo. II. c. 18.

[2] 34 Edw. III. c. 7. An attaint lay in Civil cases only. Bushell's case, State Trials, vi. 999; Hawkins, Pleas Cr., bk. i. ch. 72, s. 5.

[3] Broom, Constitutional Law, 154. [2nd ed. by G. Denman, 1885.]

[4] Smith, Commonwealth (ed. 1635), iii. ch. 2, p. 207.

[5] Bright *v.* Eynon, 1 Burr. 393.

[6] 6 Geo. IV. c. 50, s. 60.

[7] Forsyth, Hist. of Trial by Jury, 186.

another and illegal method of punishing a Jury for a false verdict, frequently employed by the Tudor and Stuart sovereigns for political purposes. This was by fine and imprisonment by the Court of the Star Chamber. In the first year of Queen Mary's reign, in 1554, Sir Nicholas Throckmorton was tried and acquitted by a Jury on a charge of high treason in connection with Sir Thomas Wyatt's rebellion. Thereupon 'the Court, being dissatisfied with the verdict, committed the jury to prison.' Some of the Jury apologised and were liberated, the rest were fined by the Court of Star Chamber and kept in prison till the fines were paid.[1]

Sir Nicholas Throckmorton's case, 1554.

After the abolition of the Star Chamber, the Crown made use of the Judges to intimidate Juries. At length the immunity of Juries was finally established in 1670, by the celebrated decision of Chief Justice Vaughan in *Bushell's Case*.[2] Edmund Bushell was foreman of the Jury who acquitted the famous William Penn and William Mead, the Quakers, on a prosecution for having preached to a large assemblage of people in Gracechurch Street, contrary to the Conventicle Act (16 Car. II. c. 4). The Recorder of London fined each of the Jury forty marks (£26 13*s.* 4*d.*); and Bushell, having been committed to prison for refusing to pay, sued out his writ of *habeas corpus* in the Court of Common Pleas. On the return being made that he had been committed for finding a verdict 'against full and manifest evidence and against the direction of the Court,' Chief Justice Vaughan held the ground to be insufficient, and discharged the prisoner.

Immunity of juries established:

Bushell's case, 1670.

In his judgment in this case, Chief Justice Vaughan was led to affirm the legal right of the Jury, without the direction of the Judge, to find a *general verdict* in criminal cases, that is, to determine not only the truth of the facts, but their quality of guilt or innocence.[3] This question came

General verdicts.

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[1] 1 State Trials, 869.
[2] 6 State Trials, 999. [Denman's Broom's *Const. Law*, 117–38.—Ed.]
[3] 6 State Trials, 1013.

up again with reference to the law of Libel. In the trial of the Seven Bishops, in 1688, the Jury asserted their right to decide upon the purport of the libel, but subsequently in the trial of the printers of the 'North Briton' in 1764, Lord Mansfield ruled that it was the province of the Court alone to judge of the criminality of a libel, a doctrine wholly subversive of the rights of Juries. This doctrine, after being both assailed and maintained for a long time, was at length reversed, in opposition to all the Judges and chief legal authorities of the time, by the passing, in 1792, of Fox's Libel Act (32 Geo. III. c. 60), which, in the form of a declaratory law, enacted that the Jury may give a general verdict of guilty or not guilty upon the whole matter put in issue.[1]

Fox's Libel Act, 1792.

The King's Continual Council, or *Concilium Ordinarium.*

After the old *Curia Regis* had been permanently split up into the three separate Courts of King's Bench, Common Pleas, and Exchequer, each under its own chief, the ancient personal jurisdiction of the King still continued to be exercised by him in his 'Continual' or Ordinary Council (the source of the later Privy Council),[2] not only as an upper court of appeal, but as a direct court of Royal justice in all cases which had not been specially delegated to the recently constituted courts of Common Law. It was, however, during the minority of Henry III. that the King's Continual or Permanent Council, as distinct alike from the *Curia Regis* of Henry II.'s time and from the *Commune Concilium Regni*, acquired special prominence and strength. It comprised not only the officers of State

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[1] See May, Const. Hist. ii. 253–263.

[2] The term 'Privy Council' does not appear to have been used until after the reign of Hen. VI.; *secretum concilium* occurs in Hemingburgh (ii. 20); and Walsingham (ii. 48), speaking of the abrogation of Acts of Parliament by Richard II. and his Council, says, *Rex cum privato consilio;* but the usual style was 'continual' or 'ordinary' council. A distinction was probably always made according to the nature of the business; subjects of purely political deliberation seem to have been discussed by the great officers of State, or as we should now say the Ministers, alone, without the presence of the Judges or other legal members of the *concilium ordinarium.* They formed therefore an internal council of government, in some respects analogous to the modern Cabinet.

and of the Royal household, with the whole body of the Judges, but a varying number of Bishops and Barons, as well as other members, both clerical and lay, whose sole official status appears to have been that of counsellors.[1] Maintained by Henry III. throughout his long reign, and adopted and further developed by Edward I., the Royal Council became henceforth the special representative and instrument of the Kingly power acting side by side with, often in opposition to, the power of the National Council. The Royal Council, as its designation 'Continual' denotes, was always sitting for the despatch of business,[2] and for that purpose it occupied different chambers about the Palace, among which the Star Chamber, *la Chambre des Etoiles*, is specially mentioned in the records of Edward III.'s reign.[3] Its powers were most extensive and indeed indefinite. It was the King's standing council of advice in all matters of administration; it received, discussed, and remitted to the proper courts a vast number of petitions, which were constantly being presented, praying for relief in various matters of Judicial cognisance;[4] it exercised by itself, in conjunction with the Lords' house in Parliament, a very great jurisdiction in causes both Civil and Criminal; and in matters of a temporary, partial, or comparatively unimportant nature, it assumed, by issuing ordinances claiming the force of statutes, the exercise of Legislative powers.

Its extensive jurisdiction.

As regards the particular description of Judicial business, Civil and Criminal, disposed of by the Council itself, we have seen that Henry II., in 1178, had constituted it a Court of Appeal for all such causes as the ordinary Judges should be incapable of determining.[5] The Council also

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[1] See Stubbs, Const. Hist. ii. 40, 255 *seq.*

[2] Sir N. H. Nicolas, Preface to Proceedings of Privy Council, p. iii.

[3] 31 Edw. III. st. 1, c. 12; Spence, Eq. Juris. i. 330.

[4] The general nature of these petitions appears from the answers of the Council which have been preserved: 'Sue at Common Law' (*i.e.*, by ordinary writ); 'sue in Chancery' (*i.e.*, before the ordinary common law court held before the Chancellor); 'to be heard before the Great Council;' 'a writ on the subject shall be despatched out of Chancery;' 'a remedy shall be provided,' &c.—Hardy, Introd. to Close Rolls, p. xxvi.

[5] *Supra*, p. 164.

exercised a convenient and salutary jurisdiction in cases of injury and oppression where, from the heinousness of the offence, the rank or power of the defendant, popular riots, or other causes, it was likely that a fair trial in the inferior Courts could not be obtained, or that the process of the Courts would be resisted by force. The rapine and oppression committed by the powerful nobility during the Middle Ages, more especially under the weak administration of the Lancastrian Kings, frequently called for the interposition of this paramount authority.[1] Further, where a person was suffering imprisonment by the process of an inferior court, the double remedy of a *subpœna* against the pursuing party and a writ of *habeas corpus cum causa* (by which the cause itself and the body of the defendant were brought to be dealt with by the Council) was sometimes given.[2] The Council had also the power of issuing writs into all special jurisdictions or franchises, such as Wales and Ireland;[3] and the poor, in theory at least, were the objects of its special care.[4]

Rise of the Chancellor's jurisdiction.

In the exercise of its Judicial functions, the *Concilium Ordinarium* appears to have been generally presided over by the Chancellor, who, until the reign of Edward III., was always an ecclesiastic of high dignity, and as keeper of the King's conscience was peculiarly entrusted with the duty of redressing the grievances of the King's subjects. This

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[1] In 'Provisions for the good governance of this land, that the Lordes, which ben of the K. Counsaill desireth,' of the 2nd year of Henry VI., subsequently embodied, with additions, in the Articles for the Regulation of the Council agreed to in Parliament, the 8th year of his reign, we read: 'Item, that alle the billes that comprehend materes terminable atte the commune Lawe, ... be remitted there to be determined; but if so be that the discrecion of the Counsaill feele *to greet myght on that oo syde and unmyght oo that othir*, [or elles other cause reasonable yai shall move hem.']—Rot. Parl. iv. 201, [343].

[2] Palgrave, Essay on the Jurisdiction of the King's Council, 90, 134.

[3] *Ibid.*, p. 19.

[4] Rot. Parl. iv. 201. 2 Hen. VI., 1423. 'Item that the Clerc of the Counsail be sworn, that every day that the Counseill sitteth on ony Billes bitwyx partie and partie, that he shall, as fer as he can, aspye which is *the porest Suyturs Bille, and that first to be redd and answered*, and *the King's Sergeant* to be sworne trewly and plainly, *to yeve the poor Man* that for suche is accept to the Counsail, *assistense and trew Counsaill* in his matere so to be suyd, *wythoute eny good takyng of hym*, on peyne of discharge of ther Offic'.'

great officer, independently of his connection with the Council, exercised an ordinary legal jurisdiction of much importance.[1] But in the reign of Edward I. we begin to perceive signs of the rise of the extraordinary or Equitable jurisdiction of the Chancellor. The numerous petitions addressed to the King and his Council, seeking the interposition of the Royal grace and favour either to mitigate the harshness of the Common Law or supply its deficiencies, had been in the special care of the Chancellor, who examined and reported upon them to the King. The inconvenience arising from the 'multitude' of petitions in the year 1280, caused a special order to be issued by Edward I., directing that all petitions be examined, and according as they concerned the Seal, the Exchequer, the law of the land, or Jewry, they should go primarily to the Chancellor, the Exchequer, the Justices, or the Justices of the Jewry. But if the wants of the petitioners were of a nature so great, or so much of grace, that the Chancellor and the Justices could not act without the King, then they should be brought before the King to learn his will; but so that no petition come before the King and his Council except by the hands of the Chancellor and the other chief Ministers.[2] This monarch was wont to assign by writ under the privy seal certain of the petitions addressed to him, praying extraordinary remedies, to the Chancellor and Master of the Rolls, or to either separately, with directions to give such remedy as should appear to be consonant to honesty (or equity, *honestati*).[3] During the reign of Edward II. the jurisdiction of the Court of Chancery was considerably extended, and there occurs frequent and familiar mention of the *consuetudo cancellariae*.[4] At length, in 1348, by a writ

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[1] On the Chancellor's ordinary jurisdiction, see Spence, Eq. Juris. i. 336. The proceedings were by Common Law process; but as the Chancellor had no authority to summon a jury, issues of fact were remitted for trial to the Court of King's Bench.

[2] Rot. Claus. 8 Edw. I., in Ryley's Placita Parl. 442.

[3] Spence, Eq. Juris. i. 335. 'Quale de *jure* et *gratia cancellariae*' occurs in a writ of 12 Edw. I.

[4] Lord Campbell's Chancellors, i. 204.

or ordinance of the 22nd year of Edward III., all such matters as were *of Grace* were directed to be despatched by the Chancellor or by the Keeper of the Privy Seal.[1] This was a great step in the recognition of the Equitable jurisdiction of the Court of Chancery as distinct from the Legal jurisdiction of the Chancellor and of the Courts of Common Law,[2] although it was not until the following reign that it can be said to have been permanently established.

Encroachments of the Council on the jurisdiction of the Common Law.

But the Council and the Chancellor, not content with their admitted sphere of action, unconstitutionally assumed original jurisdiction in cases cognisable at Common Law. In direct violation of the liberties guaranteed by the Great Charter, men were arbitrarily imprisoned without the legal process of indictment or presentment, and their lands seized into the King's hands. During the reign of Edward III. a series of statutes were passed, in answer to the repeated complaints of the Commons, restraining these illegal invasions by the Council upon the rights of property and personal liberty. In the 5th Edward III. (1331), it was enacted that 'no man from henceforth shall be attached by any accusation, nor forjudged of life or limb, nor his lands, tenements, goods, or chattels, seized into the king's hands, against the form of the Great Charter and the law of the land.'[3] Twenty years later, the Commons again petitioned against the illegal proceedings of the Council. Receiving a somewhat unsatisfactory reply from the King, they repeated their petition to Parliament in the

A series of Statutes passed in restraint of the Council and Chancery.

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[1] Sir T. Duffus Hardy, Introduction to Close Rolls, xxviii.

[2] 'By "equitable jurisdiction" must be understood,' says Lord Campbell, 'the extraordinary interference of the Chancellor, without common-law process or regard to the common-law rules of proceeding, upon the petition of a party grieved who was without adequate remedy in a court of common law; whereupon the opposite party was compelled to appear and to be examined, either personally or upon written interrogatories; and evidence being heard on both sides, without the interposition of a jury, an order was made *secundum æquum et bonum*, which was enforced by imprisonment. Such a jurisdiction had belonged to the *Aula Regia*, and was long exercised by Parliament; and when Parliament was not sitting, by the king's Ordinary Council. . . . . To avoid the circuity of applying to Parliament or the Council, the petition was very soon, in many instances, addressed originally to the Chancellor himself.' [Lives of the Chancellors, i. 8, 9.—ED.]

[3] 5 Edw. III. c. 9.

following year (1352), and obtained the enactment of a statute which, expounding the words of Magna Charta, explicitly declares :—'Whereas it is contained in the Great Charter of the Franchises of England that none shall be imprisoned nor put out of his freehold, nor of his franchises nor free custom, unless it be by the Law of the Land ; it is accorded, assented, and established, That from henceforth *none shall be taken by petition or suggestion, made to our lord the King or to his Council, unless it be by indictment, or presentment of good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by process made by writ original at the common law*, nor that none be ousted of his franchises nor of his freeholds, unless he be duly brought into answer and forejudged of the same *by the course of the law ;* and if anything be done against the same it shall be redressed and holden for naught.'[1]

Similar provisions were contained in a short enactment of the 28th of Edward III. ;[2] yet in the 36th of the same reign (1362) we find the Commons again complaining, and it was 'ordained and established by the assent of the prelates, dukes, earls, barons, and the commons, that the charters and statutes be held and put in execution according to the said petition.'[3] In the following year another statute was passed in these terms : 'Though it be contained in the Great Charter that no man be taken nor imprisoned nor put out of his freehold without process of the law ; nevertheless divers people make false suggestions to the King himself as well for malice as otherwise, whereat the King is often grieved and divers of the realm put in damage

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[1] 25 Edw. III. stat. 5, c. 4 (Stat. of the Realm, i. 321).
[2] 28 Edw. III. c. 3.
[3] Rot. Parl. ii. 269. The mention here of Dukes as a separate rank is noteworthy. The title had been bestowed for the first time in England only twenty-five years previously (in 1337), when the Black Prince was created Duke of Cornwall. Henry, Earl of Lancaster, [great-grandson of Henry] III., was, in 135[1], the next recipient ; [he *d.* 24 Mar. 1360] and his title was revived this very year, 1362, in his son-in-law, John of Gaunt. The only other English Duke then in existence, besides the Black Prince and John of Gaunt, was their brother Lionel, created Duke of Clarence [15 Sept. 1362]. [On the title of Clarence, revived, 1890, cf. *N. & Q.*, 7th S. ix. 481, x. 1, *seqq.*—Ed.]

against the form of the said Charter; wherefore it is ordained that all they which make such suggestions shall be sent with the same suggestions to the Chancellor, Treasurer, and his Grand Council, and that they there find surety to pursue their suggestions, and incur the same pain that the other should have had, if he were attainted, in case that the suggestion be found evil; *and that then process of law be made against them without being taken or imprisoned against the form of the said Charter and other statutes.*'[1]

In the 42nd year of Edward III. (1368) the Commons again petitioned: 'Because many of your commons are hurt and destroyed by false accusers, who make their accusations more for their revenge and particular gain than for the profit of the king or of his people; and of those that are accused by them some have been taken, and others are made to come before the King's Council by writ, or other commandment of the King, upon grievous pain contrary to the law: That it would please our lord the King, and his good Council, for the just government of his people, to ordain that, if hereafter any accuser propose any matter for the profit of the King, the same matter be sent to his Justices of the one bench or of the other, or of the Assizes, to be inquired of and determined according to the law; and if it concern the accuser or party, that he have his suit at the common law; and that no man be put to answer without presentment before the Justices, or matter of record, or by due process and original writ, according to

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[1] 37 Edw. III. c. 18; Stat. of the Realm, i. 384. Hallam (Midd. Ages, iii. 253,) appears to have misapprehended the purport of this obscurely-worded statute in saying that it 'recognizes in some measure those irregular proceedings before the council by providing *only* that those who made suggestions to the chancellor and great council, by which men are put in danger against the form of the charter, shall give security for proving them.' The accusers were to give security to prosecute their suit and to incur, in the event of an acquittal, the same penalty as that to which the accused would have been subjected if found guilty; but the prosecution itself was to be by 'process of law made against them [the accused] without being taken or imprisoned against the form of the said charter.' The effect of the statute would seem to be to punish all persons making false suggestions to the King himself instead of proceeding by due process of law, by compelling them to resort to the regular courts, and in addition to pay a penalty if they failed to prove their case.

the ancient law of the land. And if anything henceforth be done to the contrary, that it be void in law and held for error.' The answer to this petition, whereon a statute to the same effect was grounded, runs: 'Because this article is an article of the Great Charter, the King willeth that this be done, as the petition doth demand.'[1]

Little effect of the restraining statutes.

Acts of Parliament, however, were of little avail against the stubborn perseverance of King and Council in retaining the power which they had been so long accustomed to use. The Civil jurisdiction of the Council was at this time principally exercised in conjunction with the Chancery, now growing into importance, and the two are henceforth generally named together in the remonstrances which the Commons still from time to time continued to present. To a petition in the 13th of Richard II. (1389), that neither the Chancellor nor the King's Council should make any ordinance against the common or statute law, or the ancient customs of the land, 'but that the common law have its course for all the whole people, and that no judgment rendered be annulled without due process of law,'[2] the King returned the unsatisfactory answer; 'Let it be done as has been usual heretofore, provided the royal prerogative be saved (issint que la Regalie du Roi soit sauve); and if any one feel aggrieved, let him show it specially and right shall be done him.'[3]

The Writ of *Subpoena.*

During Richard II.'s reign, especially in the second chancellorship of Archbishop Arundel, the Equitable jurisdiction of the Chancery was much extended, and the famous writ of *subpoena* came into use as invented or improved by John de Waltham, Master of the Rolls. This innovation does not appear to have merited the great importance attached to it,[4] but it was highly unpopular at the time, and

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[1] 42 Edw. III. c. 3, and Rot. Parl. ii. 295.

[2] 'Et que null Juggement renduz soit adnulle sanz due proces du Ley.' Hallam [M. A. iii. 139] translates this passage with less than his usual accuracy, in a manner which materially alters its sense.

[3] Rot. Parl. iii. 266.

[4] Lord Campbell's Chancellors, i. 246.

excited vigorous complaints from the Commons. The lawyers, too, of the ordinary courts, manifested much professional jealousy of the growing jurisdiction of Chancery; and as the Chancellor was almost always an ecclesiastic, and was guided in his decisions by the Civil and Canon laws rather than by the customary laws of the country, the laity naturally regarded his office with distrust.[1] Nothing more, however, was effected in this reign than the passing the Act of 1393, by which power was given to the Chancellor to award damages in cases where people should be compelled 'to come before the King's Council or in the Chancery by writs grounded on untrue suggestions;'[2] a remedy which, being referred to the discretion of the Chancellor himself, whose jurisdiction was to be controlled, proved wholly ineffectual, but which was used as a Parliamentary recognition of the authority of the court, and a pretence for refusing to establish any other check upon it.[3]

Act of 1393, 17 Ric. II.

Permanent establishment of the Chancellor's equitable jurisdiction.

From the passing of the statute 17 Richard II. at the latest, the Court of Chancery may be regarded as a distinct and permanent Court, having separate jurisdiction, with its own peculiar mode of procedure, similar to that which had prevailed in the Council.[4] During the reigns of Henry IV. and Henry V., and in the minority of Henry VI., the Commons continued to remonstrate against the encroachments of the Chancery. But from the time of

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[1] 'In the reign of Edward III. the exactions of the court of Rome had become odious to the king and the people. . . . A general distaste on the part of the laity of all ranks to everything connected with the Holy See had begun to spring up. The name of the Roman Law, which in the reigns of Henry II. and III. and of Edward I. had been in considerable favour at court, and even with the judges, became the object of aversion. In the reign of Richard II. the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common law tribunals.'—Spence, Eq. Juris. i. 346.

[2] 17 Ric. II. c. 6.

[3] Lord Campbell's Chancellors, i. 257.

[4] Spence, Eq. Juris. i. 345. Suits in Chancery were commenced by petition or bill, without any preliminary writ, followed by a subpœna summoning the party complained against to appear before the court and make answer. Disputed facts might be established by the personal examination of the parties on oath, a proceeding unknown to the Common Law, but employed by this tribunal and by the Council from which it branched off.

Edward IV., although the Judges still disputed the Chancellor's authority to interfere with the proceedings of the Common Law courts, we do not trace any further opposition on the part of the Commons; and down to the reign of Charles II. the Court continued to be substantially the same as it was in the reign of Edward IV.[1]

Magnum Concilium.

The Continual or Ordinary Council has been considered with reference to its independent jurisdiction: but it was also equally conspicuous in its relation to the High Court of Parliament. The growth of the National Parliament has yet to be considered; but we may anticipate so far as to note that even after the permanent establishment of a Parliament of the three Estates under Edward I., the baronage, spiritual as well as temporal, still retained, independently of Parliament, certain powers which had been theirs when they alone constituted the *Commune Concilium Regni*, and which they ultimately transmitted to the House of Lords.[2] Under the title of *Magnum Concilium Regis et Regni* they continued to meet at intervals during the 13th and 14th centuries, sometimes in conjunction with the King's Continual Council, and occasionally also in an assembly containing all the elements of Parliament, 'summoned to meet, but not under the proper parliamentary style.' As the Commons took no part in the *judicial* power of Parliament,[3] its function as the King's great and extraordinary court of justice was performed by the King's Great Council,—the Lords' house in Parliament blended with the Ordinary Council. It is from the mixed powers of this assembly, and the double capacity of the Peerage

Origin of the Judicial character of the House of Lords

[1] Palgrave, Authority of the King's Council, 97; Spence, Eq. Juris. i. 349.

[2] Stubbs, Const. Hist. ii. 204.

[3] The Commons acknowledged in the 1st Henry IV. that they had no right to interfere in Judicial matters (Rot. Parl. iii. 427; Lords' Report, 1823, p. 360); but in the next reign they began to concern themselves with the petitions of private individuals to the Lords or Council, which in many instances were passed in the form of statutes with the express assent of all parts of the Legislature. Hence originated *private* Acts of Parliament.—See Hallam, Midd. Ages, iii. 92. [Cf. Clifford, *Private Bill Legislation*, i. 275, *n.* 1, 279, *n.* 2, 287.—Ed.]

as members both of the Parliament or Legislative council and of the deliberative and Judicial council, that the House of Lords derived its Judicial character as a Court of Appeal,[1] and the Privy Council its legislative character, which it attempted to carry out in the shape of Ordinances.[2] The Judges and other official members of the King's Continual Council originally attended as constituent members of the Great Council, and in that capacity, although not Peers, seem to have had the right of suffrage;[3] but under Edward III. or Richard II. the Lords successfully asserted their ascendancy over the Judges and rest of the Council, and took the decisive jurisdiction into their own hands.[4] Their ancient colleagues of the Council, not being lords, were thus reduced to the position of assistants and advisers, a position which they have ever since held in the Judicial proceedings of the Upper House, the heir and representative of the mediæval Great Councils.

and of the Legislative character of the Privy Council.

The original tribunal, the King's Continual Council, retained throughout its extraordinary jurisdiction. After throwing off as branches or offsets the Court of Requests,[5] and the more famous Court of Star Chamber, it transmitted its Judicial powers to the Privy Council, by whom, through the medium of a Judicial Committee,[6] they are still exercised.

Judicial powers of Privy Council.

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[1] 'The king's delegated sovereignty in the administration of justice, rather than any intrinsic right in the peerage, is the foundation on which the judicature of the lords must be supported.'—Hallam, Midd. Ages. iii. [144]. But the House of Lords may also be regarded as inheriting the Judicial functions of the Witenagemot. [As to the Council, cf. Hallam, *n.* XI., *loc. cit.*—ED.]

[2] Stubbs, Select Chart. Introductory Sketch, 23.

[3] Hale, Jurisdiction of the Lords House [ed. by Hargrave, pp. 6, 8.—ED.].

[4] Palgrave, King's Council, 54; Hallam, Midd. Ages, iii. [144].

[5] The Court of Requests, a minor Court of Equity, is supposed to have had its origin in an order of the 13th Richard II. for regulating the Council, by which the Lords of the Council were to meet between eight and nine o'clock, and the bills of the people of *lesser charge* were to be examined and despatched before the Keeper of the Privy Seal and such of the Council as should be present for the time being. This Court continued to be resorted to down to the 41st of Elizabeth, when it was virtually abolished by a decision of the Court of Queen's Bench. It was legally dissolved at the same time as the Court of Star Chamber by statute 16 Car. I. c. 10.—Palgrave, King's Council, 79, 99; Spence, Eq. Juris. i. 351.

[6] The Judicial Committee of the Privy Council was established by 3 & 4

Origin of Court of *Star Chamber.*

As regards the origin of the Court of Star Chamber, it has already been mentioned that in the reign of Edward III. the King's Continual Council was in the habit of sitting in what was called the Starred Chamber (*la Chambre des Etoiles*).[1] After the establishment of the Court of Chancery as a separate and independent jurisdiction taking cognisance of the greater portion of the Civil business of the Council, the latter body appears to have usually sat in the Star Chamber while exercising jurisdiction over such cases as were not sent to the Chancery. 'The continual complaints of the commons,' says Lord Hale,[2] 'against the proceedings before the council in causes civil and criminal, although they did not always attain their concession, yet brought a disreputation upon the proceedings of the council, as contrary to *Magna Charta* and the known laws,' and the jurisdiction appears to have gradually declined till the time of the Tudors. Henry VII., apparently prompted by a desire to restore in a new and more legal form a jurisdiction which had now become almost obsolete, created, in the 3rd year of his reign, a new court, sometimes inaccurately called the Court of Star Chamber. This new Court consisted of the Chancellor, Treasurer, and Lord Privy Seal, and any other two of them, as Judges, together with a Bishop, a temporal Lord of the Council, and the two Chief Justices, or in their absence two other Justices, as assistants.[3] By a later statute, 21 Henry VIII. c. 20, the President of the Council was added to the number of the Judges. Neither in this statute, nor in that of the 3rd Henry VII., is the name of Star Chamber applied to this Court; but as most, if not all, of its members were also members of the King's Continual, or as it was now termed Privy, Council, it was practically a judicial committee of that body. It continued

New Court instituted by Henry VII.

Will. IV. c. 41. After hearing the allegations and proofs the Committee make their report to the Queen in Council, by whom the judgment is finally given.

[1] *Supra*, p. 183.

[2] Jurisdiction of the Lords House, 39 [ed. by Hargrave, Lond. 1796.—Ed.].

[3] 3 Hen. VII. c. 1.

Jurisdiction of the old Star Chamber revived under Henry VIII.

to exist as a distinct tribunal from the Privy Council till towards the close of the reign of Henry VIII.; but in the meantime, probably during the chancellorship of Wolsey, the jurisdiction of the ancient Star Chamber (*i.e.* the Council sitting for judicial business) was revived, and in it the limited court erected by Henry VII. became gradually merged. In the revived court, the Lord Chancellor (as president), the Treasurer, Lord Privy Seal, and the President of the Council, still continued to sit, but with them were associated all other members of the Council and, at one time, apparently, all peers spiritual or temporal who chose to attend. Under the Stuart Kings the court was practically identical with the Privy Council, thus combining in the same body of men the administrative and judicial functions.

Nature of jurisdiction of the revived Court.

The Star Chamber exercised a jurisdiction analogous, in principle and procedure, to that of the Court of Chancery, and founded on the inefficiency of the ordinary tribunals to do complete justice in criminal matters and other offences of an extraordinary or dangerous character. Its Civil jurisdiction comprised disputes between alien merchants and Englishmen, questions of prize or unlawful detention of ships, and other matters of maritime law; certain testamentary causes, and suits between corporations. These were gradually absorbed by the Admiralty, Chancery, and Common Law Courts, leaving to the Star Chamber its Criminal jurisdiction; which, greatly extended under James I. and Charles I., rendered that court 'so potent and so odious an auxiliary of a despotic administration.' As a court of 'criminal equity,' it took cognisance of forgery, perjury, riot, maintenance, fraud, libel, and conspiracy; and generally of all misdemeanours, especially those of a public nature, among which were included all breaches of Proclamations, without regard to the illegality of the Proclamations themselves. Fine and imprisonment were the usual punishments inflicted; but the court was held competent to pronounce any sentence short of death. The fines were frequently of enormous amount, and though, as a rule,

A court of 'Criminal Equity.'

Its punishments.

they were reduced or remitted, they in many cases proved ruinous to the sufferers. Under the Stuart Kings the pillory, whipping, and cruel mutilations were inflicted upon political offenders by the sentence of this court; and at length the tyrannical exercise and illegal extension of its powers became so odious to the people that it was abolished by the Long Parliament in 1641.[1]

Abolished in 1641.

One of the special characteristics of the English Constitution—the permanence combined with progressive development of its primitive institutions—is illustrated by the system which we find in use under the Norman and Plantagenet kings, for the preservation of the internal peace of the country, and its defence against hostile invasion. There were two principal methods by which these ends were attained in ancient times, the one civil, the other military: (1) The police organisation of the mutual *frithborh*, or frankpledge, supplemented by the 'hue and cry' in pursuit of offenders, in which all the inhabitants of the hundred or tithing were bound to join; (2) the *fyrd*, or national militia, available not only for the defence of the country, but for the maintenance of peace at home. Service in this national force was one of the three duties—the *trinoda necessitas*—to which all alodial proprietors were subject. These primitive institutions, which may be traced to the laws of Edgar and Cnut, and had probably been customary for [some centuries], are all met with in full vigour long after the Norman Conquest, 'working their way through the superstratum of feudalism and gaining strength in the process.'[2]

Police and military organisation.

The *Frithborh*.

The *Fyrd*.

The *fyrd*, the armed folk-moot of each shire, was originally the only military system known to our ancestors. The Danish conqueror, Cnut, introduced the germ of a

The Huscarls of Cnut.

[1] 16 Car. I. c. 10. See Palgrave, Essay upon the Original Authority of the King's Council; and Hallam, Const. Hist. i. 48, ii. 29.

[2] Stubbs, Select Chart. 459. Although not an essential part of the constitution, these early methods of ensuring peace and defence 'are ancient buttresses of the fabric, and their very permanence attests as well as sustains the corporate identity of the English nationality, which feudalism has disguised, but has not been able to mutilate.'—*Ibid.* 362.

standing army in the body-guard with which he surrounded himself, composed of mercenaries drawn from various nations. But these *hus-carls* were not very numerous, being variously estimated at from three to six thousand. The limited period of service to which the feudal vassals were bound by tenure, and their general unmanageableness, caused both William the Conqueror and the succeeding Norman and early Angevin kings to employ mercenary forces, who, however, soon became odious in the eyes of the nation, and had eventually to be given up. Throughout this period the ancient national militia, though thrown into the shade for a time by the feudal and mercenary troops, still subsisted, and occasionally did good service in defence of their country, as in the battle of the Standard, in 1138, which was won by their exertions, and again in 1174, at the battle of Alnwick. The introduction of Scutage, on the occasion of the Toulouse war in 1159, as a commutation of personal service, had the effect of diminishing the Feudal levies; and although Henry II. was enabled with the money thus obtained to hire mercenaries for his foreign wars, the hatred of the English towards these forces prevented him from employing them for the purposes of home defence, while the Feudal army, besides being insufficient, was too much under the influence of the barons, whose power he was bent upon curtailing. Under these circumstances, the King determined to resuscitate the ancient national force. By the *Assize of Arms*, issued in the year 1181, in addition to requiring every military tenant to possess a coat of mail, with helmet, shield, and lance, for every knight's fee which he held in demesne, it was ordained that every free layman having chattels or rent to the value of 16 marks should be armed in like manner; that he who was worth only ten marks should possess a habergeon, an iron skull cap, and a lance; and that all burgesses and the whole community of freemen (*tota communa liberorum hominum*) should furnish themselves with doublets of mail, iron skull caps, and lances. To enforce this, the Itinerant Justices were charged to ascertain, by the

Employment of mercenary troops.

Assize of Arms, 1181.

The ancient *Fyrd* revived.

recognition of a jury of lawful knights, or other free and lawful men of the hundred or borough, the value of the rents and chattels of all freemen, and to enroll their names in separate classes, with the nature of the arms appertaining to each; and then, after causing the schedule to be read in open court, to oblige all to swear that they would provide themselves with these arms within a stated time, and be true and faithful to the King.[1]

The Alodial and Feudal military systems amalgamated under Henry III. and Edward I.

The two military systems, the ancient Alodial and the more modern Feudal, continued for some time side by side without coalescing, but tending more and more to amalgamate into the general national armament which we meet with under Henry III. and Edward I.

In 1205, a writ of King John, issued in accordance with a provision of the *Commune Concilium Regni*,[2] directs that every nine knights throughout England shall provide a tenth well equipped with horses and arms for the defence of the kingdom, and shall contribute two shillings per diem for his keep. This tithe of knights is to repair to London three weeks after Easter, ready to go wherever ordered, and to remain in the King's service, for the defence of the kingdom as long as need shall require. So far, the military tenants only are affected; but a connection with the national militia is traceable in the provision which follows, that in case of foreign invasion, 'all men shall unanimously hurry to meet the enemy with force and arms, without any excuse or delay, at the first rumour of their coming;' and also in the penalties for neglect, which were, in the case of a knightly or other landholder (unless his absence had arisen from infirmity), the absolute forfeiture by him and his heirs of the land which he held; in the case of knights or others having no land, perpetual slavery for them and their heirs (*ipsi et haeredes sui servi fient in perpetuum*), with the obligation to pay an annual poll tax of four pence each.[3]

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[1] Benedict. Abb. i. 278; Hoveden, ii. 261.

[2] Cum assensu archiepiscoporum, episcoporum, comitum, baronum, et omnium fidelium nostrorum Angliae. [Sel. Chart. 273.—Ed.]

[3] Patent Rolls, i. 55. More than five centuries before, the laws of Ina of

In the following reign we find the two military forces amalgamated for the purposes of national defence. In 1217, a writ, issued during the minority of Henry III., shortly after the battle of Lincoln, and while Louis of France was still in the country, directs the Sheriff of Berkshire to bring up the whole force of his county, both the feudal levy and also the *jurati ad arma*, the ancient local militia as reorganised under the Assize of Arms.[1] In 1231 the plan already adopted in the case of the military tenants, of dispensing with the personal service of a part on the condition of contributing to the equipment of the remainder, was applied to the *jurati ad arma*.[2]

Expansion of the ancient police organisation concurrently with that of the *fyrd*.

Concurrently with the development of the ancient *fyrd*, the primitive police organisation had also been undergoing a process of expansion. The system of frankpledge was maintained with even increased stringency. It was enforced by an injunction of William the Conqueror, and by the Assize of Clarendon under Henry II.[3] By a Royal decree issued in 1195, by Archbishop Hubert, Richard I.'s Chief Justiciar, the 'hue and cry' was enforced, and knights were assigned to receive the oaths for the preservation of the peace. All men above the age of fifteen years were required to swear to keep the peace to their lord the King;

Knights assigned *temp.* Ric. I.

Wessex (*cir.* 690) had declared [c. 51]: 'If a gesithcund man owning land neglect the "*fyrd*" let him pay cxx. shillings and forfeit his land; one not owning land, lx. shillings; a ceorlish man, xxx. shillings, as "fyrdwite."' So, in the laws of Ethelred (978–1016) [c. 28]: 'and if anyone without leave return from the "fyrd" in which the King himself is, let it be at the peril of himself and all his estate; and he who else returns from the "fyrd" let him be liable in cxx. shillings.' In the customs of Berkshire, as recorded in Domesday (i. 56), we read: Si rex mittebat alicubi exercitum, de quinque hidis tantum unus miles ibat et ad ejus victum vel stipendium de unaquaque hida dabantur ei iiii solidi ad duos menses. Hos vero denarios regi non mittebantur sed militibus dabantur. Si quis in expeditionem summonitus non ibat, totam terram suam erga regem forisfaciebat. The customs of Oxfordshire were more lenient: Qui monitus ire in expeditionem non vadit c. solidos regi dabit.—Select Chart. 61, 72, 87.

[1] Report on Dignity of a Peer, App. p. 2.

[2] Rymer, i. 200; Select Chart. [272], 334, 350.

[3] Stat. Will. Conq. 8: Omnis homo qui voluerit se teneri pro libero sit in plegio, ut plegius teneat et habeat illum ad justitiam si quid offenderit. Et si quisquam talium evaserit, videant plegii ut simpliciter solvant quod calumniatum est, et purgent se quia in evaso nullam fraudem noverint.—And see the Assize of Clarendon, capp. 9, 10, 15, 16; Select Chart. 81, 138–9.

to be neither themselves outlaws, robbers, or thieves, nor to aid such persons as receivers or consenting parties; to follow up the hue and cry in pursuit of offenders, and seize as malefactors all who failed to join or withdrew from the pursuit, and to deliver them to the Sheriff, from whose custody they should not be liberated, except by order of the King or of his Chief Justice.[1]

Conservators of the peace.

In this appointment of knights to receive the oaths may probably be discerned the germ of the office of Conservator of the Peace. *Custodes pacis* were assigned in 1253 and 1264.[2] They afterwards appear to have been occasionally chosen by the landholders of the county, but were finally appointed to their office by the Royal writ or commission.[3] By an Act of 1 Edward III., (st. 2, c. 16,) it was ordained that for the better maintaining and keeping of the peace in every county 'good men and lawful, which were no maintainers of evil or barretors' should be *assigned* to keep the peace; and a later statute in the same reign (34 Edward III., c. 1) 'gave them the power of trying felonies, when they acquired the more honourable appellation of justices.'[4]

Justices of the Peace.

Coroners.

The office of county Coroner had already been instituted under Richard I., in 1194.[5] The right of electing this officer has always resided in the freeholders of the county. In 1276 his duties were minutely prescribed by Edward I.'s

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[1] R. Hoveden, iii. 299. In Edgar's Ordinance of the Hundred (*flor.* 959–975) it was ordered: 'That a thief shall be pursued. . . . If there be present need, let it be made known to the hundredman, and let him make it known to the tithingmen, and let all go forth to where God may direct them to go. Let them do justice on the thief, as it was formerly the enactment of Edmund.' And in Cnut's Secular Dooms, c. 21: 'And we will that every man above xii. years make oath that he will neither be a thief nor cognizant of theft.'—Select Chart. 69, 73.

[2] See the writs in Rymer, i. 291, 292, 442; Select Chart. 365, 402.

[3] Palgrave, Eng. Com. i. 300.

[4] Stephen's Commentaries, ii. 665.

[5] In quolibet comitatu eligantur tres milites et unus clericus custodes placitorum coronae.—Forma procedendi in placitis Coronae Regis, c. 20; Hoveden, iii. 262. The coroner, *coronator*, is so called 'because he hath principally to do with pleas of the crown. . . . And in this light, the Lord Chief Justice of the Queen's Bench is the principal coroner in the kingdom; and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm.'—Stephen's Commentaries, ii. 656.

statute, *De Officio Coronatoris*, to which reference is still constantly made.[1]

Watch and Ward. 1233.

In 1233, the old police organisation, proving inadequate, was supplemented by a system of watch and ward in every township throughout the country.[2] Twenty years later, further regulations were issued extending and enforcing the Watch and Ward, and combining it, for the preservation of internal peace, with the Assize of Arms. (1) Watch was to be kept from sunset to sunrise between Ascension Day and Michaelmas; in the cities by companies of six good and strong armed men stationed at every gate, in the boroughs by a company of twelve, and in the townships by six, or four at the least, according to the number of the inhabitants. Any stranger attempting to pass through was to be arrested till the morning, and then, if suspected of any crime, delivered to the Sheriff and kept in custody until liberated '*per legem terrae*.' Even a stranger who arrived by daylight was not to remain in any village, except during harvest-time, unless his host would become surety for his conduct. A merchant on his road was entitled, after counting his money in the presence of the mayor and bailiffs of any city or borough, to demand of them a guard '*per malos passus et loca ambigua*,' and if subsequently robbed, could claim restitution from the inhabitants. With the exception of those specially deputed to guard the King's peace, no persons were to be allowed to carry arms. (2) The Assize of Arms was renewed and the classification remodelled, all men, 'citizens, burgesses, free tenants, villeins, and others,' between the ages of fifteen and sixty, being ranked according to the value of their land or moveables, from fifteen pounds annual rent in land down to forty shillings in chattels.[3] (3) All these were sworn to provide

Watch and Ward and Assize of Arms. 1252.

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[1] 4 Edw. I. stat. 2. [For a recent historical account of the Coroner and his duties cf. *Law Magazine and Review*, No. CCLXIV., for May, 1887, Art. *Coroners and Fire Inquests*, by Sir Sherston Baker, Bart.—ED.]

[2] Writ of Hen. III. to the Sheriff of Kent: De forma pacis conservanda. Rymer, i. 209. [Sel. Chart. 353.—ED.]

[3] The owner of land worth £15 a year, and the owner of chattels of the

themselves with the arms proper to their class, and ordered to join the hue and cry whenever required. For this purpose they were placed under the command of the local civil authorities, the mayor and bailiffs in cities and boroughs, and the constable in each township, the supreme authority over all being vested in the chief constable of each hundred.[1]

Statute of Winchester, 13 Edward I. 1285.

Under our English Justinian, Edward I., whose 'legislation is so full that the laws of the next three centuries are little more than a necessary expansion of it,'[2] the celebrated Statute of Winchester,[3] which though now to a great extent obsolete has been the foundation of modern laws, elaborated and completed the various regulations for Watch and Ward, reception of strangers, hue and cry, and the Assize of Arms. It was also specially provided that the whole Hundred where any robbery should be committed, should be answerable for the damage, unless the felons be brought to justice; and that highways leading from one market town to another should be widened, 'so that there be neither dyke, tree, nor bush, whereby a man may lurk to do hurt,' within 200 feet of each side of the road.

The provisions of the Statute of Winchester with respect to the arming of the men of each county were more immediately directed to the preservation of internal peace, by rendering more effective the power of summoning the *posse comitatus*, which the Sheriff, as chief conservator of the peace of the county, had always possessed. But these local forces still continued available for the purposes of National defence; and from the thirteenth down to the middle of the sixteenth century, it was customary, whenever invasion was apprehended from Scotland or France, to empower

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value of 60 marks (£40) were classed together with respect to their armour, and served in what may be termed the 'Yeomanry Cavalry' of that period. Each had to provide himself with a coat of mail, an iron headpiece, sword, small knife, and a horse. The other classes served on foot.

[1] Writs of 36 and 37 Hen. III. (1252–3); Rymer, i. 281, 291; Select Chart. 362, 365.

[2] Stubbs, Select Chart., Introd. 35.

[3] 13 Edw. I. c. 6, 1285.

Commissions of Array.

special 'Commissioners of Array' to muster and train all or a portion of the men of each county capable of bearing arms, and to hold them in readiness to defend the kingdom.

Obligation to keep arms enforced by Acts of Philip and Mary.

The ancient obligation to keep sufficient arms according to each man's estate was enforced by statutes of Philip and Mary, and the kind of weapons changed for those of more modern fashion ;[1] but under James I. these provisions were abrogated.[2] In 1638, Charles I. issued an unconstitutional Order in Council obliging every freeholder whose land was of the clear yearly value of £200 to furnish a horse-soldier when called upon to do so by the Lord-Lieutenant of his county. The command of the *Militia*, as the local forces were usually denominated, formed the final ground of rupture between Charles and his Parliament, the latter having passed ordinances (26 Feb. and 6 March, 1642) superseding the King's commissions of lieutenancy by the appointment of fifty-five Commissioners of Array, with power to suppress 'all insurrections, rebellions, and invasions.' This proceeding, however necessary it may have been at the time for the peace and safety of the kingdom, was clearly illegal. After the Restoration, an Act of Parliament declared that the sole supreme government of the Militia, and of all forces by sea and land, and of all forts and places of strength, was, and by the laws of England ever had been, the undoubted right of the Kings and Queens of England, and that neither

The *Militia*.

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[1] 4 & 5 Phil. and Mary, c. 2, and c. 3. Penalties were imposed on persons absenting themselves when commanded to muster by the sovereign, or any *lieutenant* authorised for the same. This was a new officer, the Lord Lieutenant, introduced in this reign as the chief military officer of the Crown in every county. For the military purposes of each county the lord-lieutenancy may be regarded as a revival of the office of the old English *earl*. Thenceforward the Sheriff became practically a purely civil officer. By the Army Regulation Act, 1871 (34 & 35 Vict. c. 86, s. 6), the jurisdiction and command of the Lords-Lieutenant of Counties over the Militia and other auxiliary forces have been revested in the Crown, to be exercised through the Secretary of State for War, and officers appointed with his advice. [The close resemblance between the positions of the ancient Earl or Ealdorman, and the modern Lord Lieutenant, was pointed out by Mr. Goldwin Smith, in his Lectures as Regius Professor of Modern History, Oxford, in Easter Term, 1863. From MS. notes of the Lectures.—ED.]

[2] 1 Jac. I. c. 25, s. 46.

House of Parliament could pretend to the same, nor lawfully levy war, offensive or defensive, against the King.[1] By another Act, provision was made for calling together, arming, and arraying the Militia, by the King's lieutenants of counties, and for charging the cost upon the landholders in proportion to the value of their estates.[2] But concurrently with the growth of a Standing Army, the local forces languished for a lengthened period, until revived and remodelled in 1757, in consequence of a panic caused by rumours of a French armament, as the national *Militia*.[3]

The ancient National force superseded by Standing Army at end of 17th century, until revived in 1757 as the *Militia*.

[1] 13 Car. II., st. 1, c. 6.

[2] 14 Car. II., c. 3.

[3] Hallam, Const. Hist. ii. 133, iii. [259]. Militiamen were to be chosen by ballot to serve for a limited number of years, but were not to be compelled to march out of their own country except in case of invasion or rebellion. In 1829, the practice was commenced and has ever since been continued, of passing an annual Act suspending the Militia ballot, the supply being furnished by voluntary enlistment. But the same Act which temporarily suspends the law empowers the Queen in Council to at once order a ballot should necessity require it. [The Constitutional results of the recent reconstruction of the Army, including the introduction of so-called 'Territorial' Regiments, and the close connection which has been effected between the Militia and the Standing Army by the system of 'linking' Militia Regiments as subordinate 'Battalions' of Regiments of the Line, are rather difficult to estimate. It would seem as though it were not now possible clearly to distinguish between the ancient National Force and the modern Standing Army, save in the fact of the temporary character of the embodiment of the Militia, and the continued restriction of its legal service to the defence of the country.

With regard to the Sheriff of the Angevin period, Sir Travers Twiss, in vol. v. of his edition of *Bracton*, Introd., xxiii., urges that 'the vicecomes of the Angevin monarchs was a very different personage from the scirgerefa of the Anglo-Saxon period. . . . The scirgerefa . . . was the executive officer of the shire who carried into execution the judgments of the shiremoot in civil and criminal matters. Under the Angevin monarchs the ealdorman had disappeared from the political stage, . . . whilst the vicecomes in the name of the king presided over the freeholders of the county. . . . Further, the vicecomes had become the chief fiscal officer of the crown within the county, and he had the command of the *fyrd*, which in Anglo-Saxon times could only be summoned by the ealdorman.'—ED.]

CHAPTER VI.

THE SUCCESSION TO THE CROWN.

The English Kingship elective, both before and after the Conquest.

THE elective character of the old English kingship, but with the choice exclusively limited, under all ordinary circumstances, to the members of one Royal house, has been already discussed in a previous chapter.[1] The Norman Conquest introduced a new dynasty, and a more comprehensive idea of Royalty, combining both the national and feudal theories of sovereignty; but it effected no legal change in the nature of the succession to the Crown. Election by the National Assembly was still necessary to confer an inchoate right to become King—a right subsequently perfected by the ecclesiastical ceremony of inunction and coronation.[2] So strongly marked was the elective character of the kingly office that, even after the choice of the Nation had been once made, the form of election was again gone through by the clergy and people assembled in

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[1] *Supra*, p. 30, 36–37.

[2] On the origin of coronation and unction see Stubbs, Const. Hist. i. 144, 145. The ancient English kings were both crowned with a *helmet* and anointed. 'The ceremony was understood as bestowing the divine ratification on the election that had preceded it, and as typifying rather than conveying the spiritual gifts for which prayer was made. That it was regarded as conveying any spiritual character, or any special ecclesiastical prerogative, there is nothing to show: rather, from the facility with which crowned kings could be set aside and new ones put in their place, without any objection on the part of the bishops, the exact contrary may be inferred. That the powers that be are ordained of God, was a truth recognised as a motive to obedience, without any suspicion of the doctrine, so falsely imputed to churchmen of all ages, of the indefeasible sanctity of royalty. . . The statements of Allen (Prerogative, p. 22) on this point are very shallow and unfair. To attribute the ideas of the seventeenth century to the ages of S. Gregory, Anselm, and Becket, seems an excess of absurdity.'—*Ibid.* p. 146 [and *n.* 2].

the church at the coronation.[1] The doctrine of the hereditary descent of the Crown gradually grew up, as the territorial idea of kingship superseded the personal idea,[2] during the two centuries after the Conquest. As the King of the English developed into the King of England,[3] the Feudal lord of the land, the kingdom came to be regarded by kings and courtiers as the private possession of the Sovereign, to be enjoyed for his own personal profit; and by degrees the feudal lawyers, arguing from a false analogy, applied to the Crown the same principles of strict hereditary right which had already begun to regulate the descent of a private inheritance. But the forms of election and coronation still continued, and periodically, as the throne became vacant on the death of each Sovereign, bore witness to the fallacy of this legal theory.[4] Edward II., who succeeded in 1307, was the first king whose reign was dated from the day following the death of his predecessor. In him, then, the principle of hereditary right appeared to have finally triumphed over the old elective system. But the true nature of the Crown as an office or trust, and the continuing right of the Nation to regulate the succession to it, were signally re-asserted not twenty years later, by the formal deposition of this unfortunate King. This

Growth of the doctrine of hereditary right.

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[1] See Maskell, Monumenta Ritualia Ecclesiae Anglicanae, vol. iii.; Freeman, Norm. Conq. iii. 44, 623.

[2] *Supra*, p. 47.

[3] John was the first who called himself 'Rex Angliae' on his Great Seal; all his predecessors had been 'Kings of the English.'

[4] 'If the descendants of the Conqueror had succeeded one another by the ordinary rule of inheritance, there can be no doubt but that the forms as well as the reality of ancient liberty would have perished. Owing to the necessity however under which each of them lay, of making for himself a title in default of hereditary right, the ancient framework was not set aside; and perfunctory as to a great extent the forms of election and coronation were, they did not lose such real importance as they had possessed earlier, but furnished an important acknowledgment of the rights of the nation, as well as a recognition of the duties of the king. The crown then continues to be elective: the form of coronation is duly performed: the oath of good government is taken, and the promises of the oath are exemplified in the form of charters. . . . The recognition of the king by the people was effected by the formal acceptance at the coronation of the person whom the national council had elected, by the acts of homage and fealty performed by the tenants-in-chief, and by the general oath of allegiance imposed upon the whole people, and taken by every freeman once at least in his life.'—Stubbs, Const. Hist. i. 338, 339.

persistence of the national right to choose the Sovereign, the same in principle whether applied to the individual King or to the selected dynasty, we shall now consider somewhat more in detail.

William the Conqueror, 1066.

We have seen how William the Norman found little difficulty, immediately after the Battle of Hastings, in procuring his election by the terrified Witan. After taking the ancient oath of the English kings, constituting a compact with the nation to govern with justice and equity, he was duly crowned at Westminster by the Archbishop of York.[1] On his death-bed the Conqueror bequeathed to his eldest surviving son, Robert, the patrimonial Duchy of Normandy. The Crown of England he would not attempt to bequeath, declaring that he held it not by hereditary right; he left the succession to the decision of God.[2] He expressed, however, his ardent wish that his younger and favourite son William should succeed to the kingship of the English, in much the same way as formerly Edward the Confessor had recommended his brother-in-law Harold.[3] Furnished with a recommendatory letter from his father to Archbishop Lanfranc, as the head of the Witenagemot, William Rufus at once hastened to England. Here he was obliged to make a triple promise,—to rule his future subjects with justice, equity, and mercy, to protect the rights and privileges of the Church, and to conform to the Primate's counsels in all things—before Lanfranc would declare in his favour. Having secured this powerful supporter, he was elected King at a meeting of the prelates and barons, in the third week after his father's death, and immediately crowned with the usual solemnities.[4]

Accession of William Rufus, 1087.

Henry I. 1100.

On the death of William Rufus in the New Forest, on the 2nd of August, 1100, his younger brother Henry, being

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[1] *Supra*, p. 50.

[2] Neminem Anglici regni constituo haeredem, sed aeterno Conditori Cujus sum et in Cujus manu sunt omnia illud commendo: non enim tantum decus hereditario jure possedi.—Ordericus Vital. vii. 15.

[3] Order. Vital. vii. 15, 16.

[4] Eadmer, Hist. Nov. lib. i. p. 13; A.-Sax. Chron. 192; Lingard, ii. 76.

close at hand, and having secured the Royal treasure, was hastily elected King the following day at Winchester.[1] But although the election was the hurried act of a small number of the barons, it was something more than a mere form. The claims of Henry's absent elder brother, Robert the Crusader, were advanced and discussed. They rested not merely on priority of birth, but upon the wishes of the late King, expressed in the arrangement which he had made with Duke Robert, at Caen, in 1091, that each should be heir to the other in case of his dying childless. Ultimately the arguments of the Earl of Warwick gained a decision in Henry's favour;[2] and two days afterwards (Aug. 5) he was crowned at Westminster by Maurice, Bishop of London, and took the ancient coronation oath of the English kings.[3] In the Charter of Liberties, which he issued at the same time, he announces to the nation his coronation *Dei misericordiâ et communi consilio baronum totius regni Angliae.*[4]

Stephen. 1135.

The male line of the Conqueror became extinct on the death of Henry I. The late King had endeavoured to secure the Crown to his own offspring, first by inducing the baronage to do homage and fealty to his son William, and, after the untimely death of the Atheling, by exacting,

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[1] William Rufus 'was slain on a Thursday and buried the next morning; and after he was buried, the Witan, who were then near at hand, chose his brother Henry as King, and he forthwith gave the bishopric of Winchester to William Giffard, and then went to London.'—A.-Sax. Chron. *s.a.* 1100.

[2] *s.a.* 1100. Occiso vero rege Willelmo. . . . (Henricus) in regem electus est, aliquantis tamen ante controversiis inter proceres agitatis atque sopitis, annitente maxime comite Warwicensi Henrico.—Will. Malmes. Gesta Regum, v. § 393.

[3] The exact words of the oath, agreeing with the ancient form used at the coronation of King Ethelred II. have been preserved: In Christi nomine promitto haec tria populo Christiano mihi subdito. In primis me praeceptu-rum et opem pro viribus impensurum ut ecclesia Dei et omnis populus Christianus veram pacem nostro arbitrio in omni tempore servet; aliud ut rapacitates et omnes iniquitates omnibus gradibus interdicam; tertium ut in omnibus judiciis aequitatem et misericordiam praecipiam, ut mihi et vobis indulgeat Suam misericordiam clemens et misericors Deus.—Maskell, Mon. Rit. iii. 5, 6: Select Chart. 95. [For an interesting historical analysis of the ancient Coronation formulæ in Celtic and Mediæval Scotland, cf. *Scottish Review.* Paisley. Gardner, vols x. and xi. for 1887–8, Arts. *Early Scottish Coronations* and *The Scottish Coronations of Charles I. and Charles II.*—Ed.]

[4] Thorpe, Ancient Laws and Institutes, 215.

on three separate occasions, an oath from the prelates and barons to acknowledge the Empress Matilda as his successor. This was a stretch of the King's Constitutional powers; and the attempt to bind men's consciences more firmly by the triple repetition of the oath would seem to indicate his own distrust. A recommendation to the nation was all he could lawfully give, and it was a moot point whether even this recommendation had not been withdrawn on his death-bed.[1] Moreover, a woman was incapable of performing the martial duties which then appertained to Royalty, and the acceptance of the Empress Matilda practically meant subjection to the rule of her husband, Geoffrey of Anjou—a man obnoxious to the Normans as an Angevin, to both English and Normans as a foreigner.[2] On the third occasion when fealty had been sworn to the Empress, her infant son, afterwards Henry II., was joined with her, and was nominated by his grandfather to be King after him. But, as the child was little more than two years old when the throne became vacant by Henry's death, he was clearly ineligible. Such being the position of affairs, the prompt action of Stephen of Blois, Count of Mortain and Boulogne,[3] his personal popularity with the men of London and Winchester, and the great influence of his brother Henry, Bishop of Winchester, ensured his election and coronation.[4] To call him a usurper is an abuse of the term. His election, like that of his uncle, Henry I., was, indeed, somewhat irregular, few only of the magnates having been present:[5] but the

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[1] Gesta Stephani, p. 7.

[2] Cont. Flor. Wig., App. Volente igitur Gaufrido comite cum uxore sua, quae haeres erat, in regnum succedere, primores terrae, juramenti sui male recordantes, *regem eum* suscipere noluerunt, dicentes 'Alienigena non regnabit super nos:' initoque consilio, Stephano comiti . . . coronam regni imposuerunt.—Select Chart. 110.

[3] Stephen was a younger son of Stephen, Count of Blois, by Adela, daughter of William the Conqueror. His wife, Matilda, was the daughter and heiress of Eustace, Count of Boulogne, by Mary, younger sister of Matilda, wife of Henry I., and niece of Edgar Atheling.

[4] Will. Malmes. Hist. Nov. i. § 11.

[5] Coronatus est ergo in regem Angliae Stephanus . . . tribus episcopis

paucity of magnates was counterbalanced by the presence and support of the citizens of London, who might fairly claim to speak on behalf of the commonalty of the realm,[1] and the election was shortly afterwards confirmed by the adhesion of the great body of the baronage, clerical and lay. In the second of Stephen's charters his title to the throne is somewhat elaborately set forth: *Dei gratiâ assensu cleri et populi in regem Anglorum electus, et a Willelmo Cantuariensi archiepiscopo et sanctae Romanae ecclesiae legato consecratus, et ab Innocentio sanctae Romanae sedis pontifice confirmatus.*[2] Henry I., in a letter to Anselm notifying his accession to the throne, had in like manner declared himself *nutu Dei a clero et a populo Angliae electus.*[3] Both kings founded their title on the choice of the people. The confirmation by the Pope was probably regarded, in Stephen's case, as a tacit condonation of the breach of their oaths by the King, prelates, and barons, who had all sworn to the late King Henry to support his daughter's claim.

Henry II. 1154.

At the time of Stephen's death, on the 25th Oct., 1154, Henry, Duke of Normandy, was absent from England. He returned on the 8th December, and after an interregnum of nearly two months, was elected and crowned King on the 19th of the same month.[4] He succeeded without opposition, not by hereditary descent, but by virtue of the

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praesentibus, archiepiscopo, Wintoniensi, Salisberiensi, nullis abbatibus, paucissimis optimatibus.—*Ibid. loc. cit.*

[1] Cumque . . . cum paucissimo comitatu applicuisset, ad ipsam totius regionis reginam metropolim, maturato itinere, Londonias devenit . . . Majores igitur natu, consultuque quique provectiores, concilium coegere, deque regni statu, pro arbitrio suo, utilia in commune providentes, ad regem eligendum unanimiter conspiravere . . . . Id quoque sui esse juris, suique specialiter privilegii, ut si rex ipsorum quoquo modo obiret, alius suo provisu in regno substituendus e vestigio succederet. Gesta Stephani, p. 3. Cf. also Chron. A.-Sax. *s. a.* 1135; and Will. Malmesb. Hist. Nov. i. § 11 [in regem exceptus.]

[2] Statutes of the Realm—Charters of Liberties, p. 3.

[3] See Anselm's Letters, lib. iii., Ep. 41.

[4] Ab omnibus electus est.—Rob. de Monte, *s. a.* 1154. Anno a partu Virginis M.C.LIV. Henricus, Henrici majoris ex filia olim imperatrice nepos, post mortem regis Stephani a Normannia in Angliam veniens, hæreditarium regnum suscepit, conclamatus ab omnibus, et consecratus mystica unctione in regem, concrepantibus per Angliam turbis, "vivat rex."—Will. Newb. ii. c. 1. [Eng. Hist. Soc., 1856, p. 89.—Ed.]

recent compact of Wallingford, ratified by the assent and homage of the baronage.[1] The kingship was gradually passing out of the elective stage and becoming more Feudal in character. Obtaining homage from all the feudatories was thought to give a secure title. The election became, as it were, feudalised in form, and to a great extent in spirit also. The action of Henry I., in exacting homage and fealty, first to his son William and then to his daughter and grandson, has already been noticed. In a similar manner Stephen, in 1152, endeavoured, unsuccessfully, to secure the recognition of his son Eustace as heir to the throne; and Henry II. early procured the baronage to do homage, first to his young son William and then to his son Henry. But he took a further and, as it turned out, most unfortunate step. Not satisfied with the homage of the baronage, which might be regarded as a prospective election, he borrowed from the practice of France and the Empires of the East and West the expedient of crowning the son during the lifetime of the father. The young Henry was twice solemnly crowned; on the first occasion in 1170, alone, and again, two years later, in company with his wife, daughter of Louis VII. of France. Under the sinister guidance of his father-in-law he soon assumed the position of a rival and an enemy, rather than of an heir apparent.

Richard I. 1189.

It was only a few days before his death, on the 6th of July, 1189, that Henry II. had recognised his eldest surviving son, Richard Cœur-de-lion, as his successor. Richard remained absent from England about five weeks engaged in receiving investiture of the Duchy of Normandy (July 20th), and in concluding a treaty with Philip of France. In the meantime his mother, Queen Eleanor, issued a proclamation to the English calling upon all freemen to take the oath of allegiance to her son Richard as '*Lord* of England.'[2] No opposition of any kind was made by pre-

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[1] *Supra*, p. 92.

[2] Bened. Abbas, ii. 74, 75. Et juret unusquisque liberorum hominum totius regni, quod fidem portabit domino Ricardo domino Angliæ, filio domini regis Henrici et dominæ Alienor reginae, [. . . . sicut ligio domino suo.—ED.]

lates, barons, or people, and on the 3rd of September, three weeks after he had landed in England, Richard took the usual Coronation oaths, and was duly anointed and crowned, with extraordinary splendour and formality, in the presence of the assembled 'archbishops, bishops, earls, barons, clergy, and a great multitude of knights.'[1] In the Annals of Dunstable he is said to have been 'elevated to the throne by hereditary right, after a solemn election by the clergy and people,'[2] words which indicate the mixed notion of hereditary right and popular choice which was then beginning to prevail.[3]

John. 1199.

Richard I. died without issue on the 8th April, 1199. After an interregnum of a duration of about six weeks, his younger brother John, to whom the barons, by Richard's death-bed orders, had already sworn fealty,[4] succeeded to the throne, with 'a questionable title perfected by the election of the nation.'[5] Even in private inheritances the doctrine of representation, by which the issue of a deceased elder brother would exclude the succession of the surviving younger brother, was as yet unsettled.[6] In the

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[1] Deinde Ricardus Dux Normanniae venit Lundonias, et congregatis ibi archiepiscopis et episcopis, comitibus et baronibus et copiosa militum multitudine, tertio nonas Septembris, die Dominica . . . consecratus et coronatus est in regem Angliae.—Bened. Abbas, ii. 78.

[2] Inde veniens in Angliam, hæreditario jure promovendus in regem, post cleri et populi solemnem electionem, triplici involutus est sacramento . . . Tunc dominus Cantuariensis divina celebravit; et nocte sequenti plures Judæorum occisi sunt, et plures rebus spoliati. Ann. Dunstapl. *s. a.* 1189 (Annales Monastici, iii. p. 24–5). The earlier portion of the Annals of Dunstable down to 1201 appears to be principally derived from the 'Abbreviationes Chronicorum' and the 'Imagines Historiarum' of Ralph de Diceto, the latter an original work of a contemporary. [Hardy, Cat. of Brit. Hist. 1871, iii. 252.]

[3] By the chroniclers Richard is termed 'Earl' from his father's death till his investiture as Duke of Normandy on July 20th, thenceforward 'Duke Richard' till his coronation on the 3rd of September, 1189, when he became for the first time 'Rex.' His regnal years are reckoned only from this date. The curious mistake of Allen (Royal Prerogative, p. 45), in asserting that there are public acts in Richard's name, dated in the first year of his reign, before his coronation had taken place, although exposed by Nicolas in his Chronology of History, was unfortunately allowed to remain uncorrected in the second edition of Allen's work published, after the author's death, in 1849.

[4] Cum autem rex de vita desperaret, divisit Johanni fratri suo regnum Angliae, et fecit fieri praedicto Johanni fidelitates ab illis qui aderant.—Hoveden, iv. 83.

[5] Stubbs, Select Chart., Introductory Sketch, 29.

[6] Glanvill, l. vii. c. 3.

succession to the Crown of England the doctrine had never hitherto obtained. Nearly two centuries had still to elapse before this stage in the growth of hereditary right was distinctly marked by the unopposed succession of Richard II. as heir to his grandfather.[1] The claim of proximity of blood, which the uncle possessed, was much more obvious in early times than the subtle doctrine of representative primogeniture; and he was usually far better fitted by age, experience, and personal authority, to undertake the onerous duties of mediæval Royalty. In England there appears to have been an absence of any feeling in favour of the boy Arthur of Brittany, son of John's elder brother Geoffrey: while John's claim was supported by the death-bed recommendation of the late King, the influence of the Queen-mother, and the adherence of a numerous and influential party among the barons. He was elected King without opposition, and crowned at Westminster on the 27th of May. At his election Archbishop Hubert, according to the account given by Matthew Paris, made a very remarkable speech, in which he declared the Crown to be absolutely elective, giving even to the members of the Royal stock no preference unless founded on their own personal merit.[2] The truth of this incident has been doubted by

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[1] 'No opposition was made to the accession of Richard the Second, but there seems to have been a strong notion in men's minds that John of Gaunt sought to displace his nephew. In earlier times, as the eldest and most eminent of the surviving sons of Edward the Third, John of Gaunt would probably have been elected without any thought of the claims of young Richard.'—Freeman, Growth of Eng. Const. 213.

[2] Matt. Paris (ed. Wats), p. 197:—Archiepiscopus stans in medio omnium dixit, 'Audite universi. Noverit discretio vestra quod nullus praevia ratione alii succedere habet in regnum, nisi ab universitate regni unanimiter, invocata Sancti Spiritus gratia, electus, et secundum morum suorum eminentiam praeelectus, ad exemplum et similitudinem Saul primi regis inuncti, quem praeposuit Dominus populo Suo, non regis filium nec de regali stirpe procreatum; similiter post eum David Jessae filium; hunc quia strenuum et aptum dignitati regiae, illum quia sanctum et humilem; ut sic qui cunctos in regno supereminet strenuitate, omnibus praesit et potestate et regimine. Verum si quis ex stirpe regis defuncti aliis praepollerit, pronius et promptius in electionem ejus est consentiendum. Haec idcirco diximus pro inclyto comite Johanne, qui praesens est frater illustrissimi regis nostri Ricardi jam defuncti, qui haeredi caruit ab eo egrediente, qui providus et strenuus et manifeste nobilis, quem nos, invocata Spiritus Sancti gratia, ratione tam meritorum quam sanguinis regii unanimiter elegimus universi.' [Sel. Chart. 263.]

some; but from the mouth of a zealous partizan the speech is by no means improbable. The Archbishop, in fact, merely expressed, in very plain language indeed, what had been the theory of the Constitution down to the time of Earl Harold, in whose person the theory was practically exemplified; and what, if we except the denial of any preference to members of the Royal house, had actually been the ordinary practice both before and since the Conquest.[1] In the preamble of a charter issued by John shortly after his accession he was careful to unite both his titles: *Rex jure haereditario, et mediante tam cleri et populi consensu et favore.*[2]

Henry III. 1216.

There was every probability that a justly incensed nation would have compelled the House of Anjou to yield the throne of England to a new dynasty, when the death of John on the 19th of October, 1216, removed the chief cause of offence, and gave his family one more chance before it was too late. The young Henry was hastily crowned at Gloucester on the 28th of October, by the Legate Gualo;[3] but he owed his kingdom to the energy and statesmanship of the Regent Pembroke, who, by timely concessions, secured, with much difficulty, the adhesion of the majority of the nation.[4] Arthur of Brittany had left a sister Eleanor, known as the 'Damsel of Brittany,'[5] who survived till

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[1] 'Matthew Paris supposes that the archbishop, warned of John's utter faithlessness and foreseeing the troubles of his reign, wished to impress upon him and upon the people that as an elected king he must do his duty under pain of forfeiture. But the speech of Hubert was probably in itself nothing more than a declaration of John's fitness to be elected, the recollection of which would naturally recur to those who heard it when they found out how unfit he was to reign. The enunciation however of the elective character of the royal dignity is of importance, whether it be due to the archbishop or to the historian.' —Stubbs, Const. Hist. i. 515.

[2] Rymer, i. 76.

[3] Ann. Waverl. p. 286. At the coronation only Gualo the Legate, the bishops of Winchester, Worcester, Coventry, and Bath, and the earls of Chester, Pembroke, and Ferrers, Wm. Brewer and Savary de Maulac were present: Reliqui omnes comites et barones sequebantur Ludowicum. Nec multo post Gualo legatus concilium celebravit apud Bristollas in festivitate Sancti Martini, in quo coegit undecim episcopos Angliae et Walliae qui praesentes erant, et alios praelatos inferioris ordinis, sed et comites et barones ac milites qui convenerant, Henrico regi fidelitatem jurare.—*Ibid.*

[4] *Supra*, p. 148.

[5] [There seems to be a modern tendency, among some Heralds, to treat the

1241, but she seems never to have been regarded as having a claim to the succession.[1]

Edward I. 1272.

Down to Henry III. inclusive the reign of each King is dated from his coronation only. The interregnum between the death of the old and the coronation of the new King was always made as short as possible, in consequence of the serious inconvenience resulting from the doctrine that the King's peace was interrupted during a vacancy of the throne. But when the coronation was delayed, as happened in the cases of Henry II., Richard I., and John, who had each been absent in France at the death of his predecessor, the regal title was never assumed until the process of election and coronation had been gone through.[2] Until then they were only entitled 'Dux Normanniae,' or, as Richard I. was styled in the proclamation issued by his mother[3]—and also in a charter granted by him before his coronation, '*Dominus* Angliae.'[4] Edward I. was the first King who reigned before his coronation. His father, Henry III., died on the 16th Nov., 1272, whilst Edward was absent in Palestine. Four days afterwards, when Henry was buried in Westminster Abbey, the Earl of Gloucester, with the prelates and barons, swore allegiance to Edward as King.[5] His

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succession to the English Crown as if it were, and had always been, descendible according to the strict rule of primogeniture, and it therefore appears desirable to remind the student of Constitutional History that the description of 'Heiress Presumptive to the English Throne,' attributed to Eleanor of Brittany, in a recent Paper on 'Heiresses Presumptive,' by H. Murray Lane, Chester Herald, in *Notes and Queries*, 7th s., vii., 221, is entirely out of harmony with the Legal and Constitutional doctrine of Eleanor's own day, when it was never supposed that she held such a position.—ED.]

[1] Both Glanvill and Bracton were inclined to favour the claim of the nephew as against the uncle in the succession to private inheritances. But so long as Eleanor lived the '*casus regis*' seems to have been regarded as an obstacle in the way of a judicial decision for the nephew. In treating of the writ of entry, Bracton, f. 327 b., says expressly, et cum de propinquitate constiterit *quamdiu casus regis duraverit* nunquam ad judicium proceditur.—Twiss's Bracton, i. xlv.

[2] Nicolas, Chron. of Hist. 272.

[3] *Supra*, p. 210.

[4] Archæologia, xxvii. 109.

[5] Antequam corpus regis Henrici traditum esset sepulturæ, Gilebertus comes Gloverniae . . . propria voluntate ductus, tactis sacrosanctis corporale præstitit juramentum, quod pacem regni pro viribus suis custodiret, et fidelitatem domino Edwardo tanquam domino suo per omnia observaret. Similiter . . . . . archiepiscopus Eboracensis et etiam Herefordiæ et Warennæ comites

hereditary claim perfected by the fealty of the baronage—the old election in a feudal guise—appears to have been now regarded as conferring the name of King previous to coronation. But the idea of election, and the necessity for consent to a King's accession were still preserved. During the four days which elapsed between the death of Henry and the recognition of Edward as King, the throne was legally vacant. The new King's reign was dated not from the death of his father, but *from the day on which the oath of fealty was taken:*[1] and in the order for the proclamation of the King's peace, issued in his name three days later by the Royal Council, Edward asserts the crown of England to have devolved upon him *successione haereditaria ac procerum regni voluntate et fidelitate nobis praestita.*[2] Shortly afterwards the oath of fealty was renewed in a great assembly held at Westminster after the feast of St. Hilary, 1273, and attended not only by all the prelates and other magnates of the kingdom, but by four representatives from each county and each city.[3]

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et multi alii qui tunc præsentes erant ibidem. Ann. Winton. p. 112. Magnates regni nominarunt Edwardum filium suum in regem. Annal. Dunst. p. 254. Recognoverunt paternique successorem honoris ordinaverunt. Rishanger, p. 75. 'Nominare' and 'ordinare' imply much more than passive acquiescence in the succession of an heir.

[1] Duffus Hardy, Introduction to Close Rolls; Nicolas, Chronology of History, p. 291–2; Allen, Royal Prerogative (ed. 1849), p. 46.

[2] Rymer, i. 497. 'For the first time,' says Bishop Stubbs (Const. Hist. ii. 103) of Edward I.'s accession, 'the reign of the new King began, both in law and in fact, from the death of his predecessor.' With all deference, however, to so eminent a historian, it is evident that although the hereditary claim of Edward was admitted without opposition, yet in law, and in fact, there was actually no King for the space of four days. Indeed, the Bishop had just before told us 'that his reign began on the day of his father's funeral.' The fact that the regnal years of Edward were dated only from the day of his recognition as King by the baronage marks the persistence of the elective idea, and the difference still recognised between the Kingship and a private inheritance. It is important not to antedate the steps in the development of the hereditary doctrine. As Edward I. was the first King who reigned before coronation, so Edward II. was the first whose reign is dated from the day following the death of his predecessor. The theory embodied in the legal maxim 'the King never dies,' is of still later growth. It may be said to have been practically accepted from the accession of the House of York: yet even Henry VIII.'s reign commenced on the day after the death of his father (Nicolas, Chron. of Hist.). From the accession of Edward VI. there has been no interregnum, however short, except only where the line of succession has been broken.

[3] Ann. Winton. p. 113.

Edward II. 1307.

In the proclamation issued on the accession of Edward II. he was declared to be already King of England by descent of heritage ('ja roi d'Engleterre par descente de heritage'), the words referring to the consent of the magnates of the realm being omitted.[1] From henceforth the old civil election dropped out, and hereditary succession became the established rule, subject, however, in cases of necessity, to the paramount power of Parliament, not only to depose an individual Sovereign, but also, for good reason, to set aside the direct line of descent and establish a new Royal stock.[2] The ecclesiastical form of election by the clergy and people survived the civil form, and was maintained, in the coronation service, down to the accession of Henry VIII.; since whose time a mere recognition by the people is all that takes place.[3] The right of the National Assembly—whether acting as a technically constituted Parliament, or as a Convention of the Estates of the Realm—to regulate and vary the succession to the Crown, has been constantly claimed and exercised whenever the safety and welfare of the Kingdom have impera-

Hereditary succession established:

But subject to the paramount right of Parliament to settle the succession.

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[1] Rymer, ii. 1. Walsingham (i. 119) says, Successit . . . non tam jure haereditario quam unanimi assensu procerum et magnatum.

[For a recently printed contribution to the history of Edward II., see *Chronicon Adæ de Usk*, edited for the Royal Society of Literature, from a MS. in Brit. Mus., by E. M. Thompson, now Principal Librarian.—ED.]

[2] 'Hereditary succession in monarchical states is nothing more than an expedient in government founded in wisdom, and tending to publick utility: and consequently whenever the safety of the whole requireth it, this expedient, like all rules of merely positive institution, must be subject to the controul of the supreme power in every state. . . . Title by descent was always esteemed by the legislature a wise expedient in government; but in cases of necessity, it was never thought to confer an indefeasible right; because that would have been *to defeat the end for the sake of the means.*'—Sir Michael Foster, (one of the Judges of the King's Bench), Discourses on Crown Law, p. 405 (ed. 1792).

[3] The form for the coronation of Henry VIII., drawn up by that King himself, has been preserved. Hereditary right and elective right are set forth in equally strong terms. Prince Henry is described as 'rightfull and undoubted enheritour by the lawes of God and man,' but also as 'electe, chosen and required by all the three estates of this lande to take uppon hym the said coronne and royall dignitie.' The assent of the people is asked thus: 'Woll ye serve at this tyme, and geve your wills and assents to the same consecration, enunction and coronacion? Whereunto the people shall say with a grete voyce, Ye, Ye, Ye; So be it; Kyng Henry, Kyng Henry.'—Maskell, Mon. Ritual. iii. 73; Freeman, Norm. Conq. iii. 622.

tively required it. The depositions by the Witan of Sigebert in 755, of Ethelred the Unready in 1017, and of Harthacnut in 1037, have already been referred to in a previous chapter.[1] Since the Norman Conquest there had hitherto been no actual case of formal deposition: but we have seen the Barons under King John renouncing their allegiance and electing Louis, son of the King of France, to be their King;[2] and the misgovernment of Henry III. caused a change in the succession to be again mooted amongst the baronage. In 1327, however, Edward II. was formally deposed by the Parliament which assembled at Westminster on the 7th January, 1327, after a bill of six articles, drawn up by Stratford, Bishop of Winchester, had been exhibited against him. These articles set forth as the reasons for his deposition, that he was devoid of the ability to govern, had suffered himself to be led in all things by evil councillors, had neglected the business of the state, lost the Crown of Scotland, broken his coronation oath, ruined his kingdom and people, and that there appeared no hope of his amendment. The Parliament therefore resolved that the Lord Edward, the King's eldest son, should immediately take upon him the government of the kingdom and be crowned King. As an additional precaution, the Queen's advisers determined to procure a formal resignation from Edward II. On the 20th of January a deputation of prelates, earls, barons, abbots, and two judges, waited on the King, then a prisoner in Kenilworth Castle, and, after notifying to him the resolution of Parliament, obtained his consent to the election of his son. Then Sir William Trussell, in the name of the rest, and as procurator for the whole Parliament, renounced the homage and fealty which the members had severally made to the King, and declared that they should thereafter account him as a private person without any manner of Royal dignity. The ceremony ended by Sir Thomas Blount, the Steward of the House-

Deposition of Edward II. 1327.

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[1] *Supra*, p. 35. [2] *Supra*, p. 148.

hold, breaking his staff of office, as a sign that his master had ceased to reign as completely as if he were dead.[1]

Edward III. 1327.

In the proclamation of his peace issued on the 24th of January, the twofold title of Edward III., derived from the common counsel and consent of the Estates of the realm and the resignation of his father, are carefully set forth. On the 29th of January he was crowned at Westminster.[2]

House of Lancaster. Deposition of Richard II. 1399.

The deposition of Richard II., in 1399, was preceded, as in Edward II.'s case, by a so-called voluntary resignation, and accompanied by Henry of Lancaster's very remarkable claim to the Crown, in which an insinuated priority of descent from Henry III., a right of conquest, and the misgovernment of Richard are artfully combined. But the power of the National Assembly to depose and elect the Sovereign is brought out with peculiar distinctness in the official record entered on the Parliamentary Rolls. The Parliament which deposed him was summoned to meet on the 30th September, by writs issued in Richard's name on the 19th of August, the same day on which he met the Duke of Lancaster at Flint. Richard, while a prisoner in the Tower, executed a formal Deed of Resignation on the 29th of September, which was presented to the Parliament assembled on the following day. The resignation of the King was held to have the technically legal effect of dissolving the Parliament as soon as it had met,[3] but the Assembly, as the representative of the Estates of the Realm,[4] accepted the resignation, deposed the King, and elected his successor. In the record of the proceedings, after reciting Richard's resignation of the Crown, the

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[1] T. de la Moor, pp. 600, 601; Knyghton, c. 2549; and see Lingard, iii. 345, and Stubbs, Const. Hist. ii. 362. The Parliament Roll, which was produced in Parliament in the 10th year of Richard II. (*infra*, p. 305) is not now extant.

[2] Rymer, ii. 683, 684.

[3] Fresh writs were consequently issued on the 30th Sept. summoning the same assembly to meet as a Parliament six days later. Lords' Report on Dignity of a Peer, iv. 768.

[4] Pares et proceres regni Angliae spirituales et temporales et ejus regni communitates, omnes Status ejusdem regni repraesentantes. Walsingham, ii. 234.

crimes of which he had been guilty, and his general unfitness to be King, the formula of deposition runs: *Propter praemissa, et eorum praetextu, ab omni dignitate, et honore regiis, si quid dignitatis et honoris hujusmodi in eo remanserit, merito deponendum pronunciamus, decernimus, et declaramus, et etiam simili cautela deponimus.* The throne is then declared vacant: *ut constabat de praemissis, et eorum occasione, regnum Angliae, cum pertinentiis suis vacare.* Finally the crown is granted to Henry: *concesserunt unanimiter ut Dux praefatus super eos regnaret.*[1] The election of Henry IV. was of course determined by special circumstances, yet in one aspect it was but a recurrence to the ancient practice of choosing the worthiest member of the Royal house to fill the throne, to the exclusion of the nearest lineal heir, who was a minor. The accession of Richard II. (1377) had been, as we have seen, the first instance in the succession to the Crown of England, where the claims of representative primogeniture were preferred to those of proximity of blood. The next lineal heir, on the deposition of Richard II., was the child Edmund Mortimer, Earl of March, the great-great-grandson of Edward III., through Philippa, daughter of Lionel, Duke of Clarence, third son of that King: while Henry IV., the elect of the people, was the son of John of Gaunt, and grandson of Edward III., in the prime of life, and distinguished in both arms and council. Under Henry IV. the right of succession to the Crown was settled, altered, and re-settled no less than four times. In his first Parliament —the same which had deposed Richard II. on the 30th of September and re-assembled under the new King's writs on the 6th of October, 1399—the Lord Henry, Prince of Wales, with the assent of the Lords Spiritual and Temporal and all the Commons, was 'created and ordained Heir Apparent, to have and enjoy the Realm in time to come when God it should will.'[2] Four years afterwards, by an

Election of Henry IV

The Crown entailed on Henry IV and his issue.

1399.

1404.

[1] Walsingham, ii. 234–238; Rot. Parl. iii. 416, *et seq.*

[2] Item, come en cest present Parlement par notre Seigneur le Roy et

Act (5 Hen. IV.) passed in the Parliament which met at Westminster on the 14th of January, 1404, the succession was entailed upon the Prince of Wales and the heirs of his body, and in default upon his brothers, the other sons of the King, and their issue in order of seniority.[1] In addition to his four sons, Henry, Thomas, John, and Humphrey, Henry IV. had two daughters who appear to have been intentionally ignored in this settlement: the daughters of his sons were, however, capable of inheriting under the entail. Two years later it seems to have been thought desirable to exclude these also, probably with a view to negativing the right of succession through females which was the basis of title of the young Earl of March. Accordingly, on the 7th of June, 1406, an Act was passed resettling the Crowns of England and France on the King and the heirs *male* of his body;[2] but this restriction being quickly perceived to involve certain inconvenient consequences, the last Act was repealed[3] on the 22nd December, in the same year, and the Crown was finally settled

[Settling Acts,]

June, 1406.

December, 1406.

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assent des Seigneurs Espirituelx et Temporelx et toutz les Communes, nostre Seigneur Seigneur Henry Prince du Gales estoit creez et ordeignez Heir apparant, a avoir et enjoir le Roialme en temps advenir quant Dieu le voille: Queles assent et ordinance plese a notre Seigneur le Roy faire entrer de record en les Rolles du ceste present Parlement. *Responsio:* Le Roy le voet. Rot. Parl. iii. 434 (*s. a.* 1399, 1 Hen. IV.).

[1] A mon tres honore Seigneur le Prince son eisne Fitz, come Heir Apparant et enheritable a la Corone d'Engleterre, et a les Heires de son corps issantz; et pur defaute d'issue de son corps; a mes tres honores Seigneurs ses Freres, et lour issue successivement et enheritablement solonc la Ley d'Engleterre. Rot. Parl. iii. 525, 575; perforce d'icel Act fait l'an de vr̃e regne quint; iii. 581.

The distinction between the generic term 'heirs,' denoting all heirs, collateral as well as lineal, and the specific term 'heirs of the body,' which is restricted to lineal heirs alone, is sometimes overlooked by non-legal historians. Even Lingard (Hist. iv. 317) and Stubbs (Const. Hist. iii. 45) are not free from this inaccuracy; and in the case of the latter, who tells us that the succession was settled 'on the Prince of Wales and his *heirs*, and in default, on the other sons of the King in order,' this inaccuracy leads to a legal absurdity.

[2] Rot. Parl. iii. 575–6. Septimo die Junii, anno regni nostri septimo.

[3] In the repealing statute (7 & 8 Hen. IV.) the reason for the change as alleged in the recited petition of the Lords and Commons is: Et vueillantz les ditz Seigneurs et Commune pluis tost faire et procurer chose qe purra tourner en honour et encres de Vous, tres soverein Seigneur, et du dit Monsr̃ le Prince, et des ditz Messr̃s ses Freres, vos tres honorables Filz, qe de la Succession de mesmes voz Filz de droit de la Corone ascun restriction demaunder. Rot. Parl. iii. 581.

upon King Henry and the heirs of his body, thus admitting into the line of succession not only his sons and their issue, female as well as male, but also his daughters and their descendants.[1]

The House of Lancaster reigned for more than sixty years by a good Parliamentary title. The House of York, by whom the doctrine of indefeasible hereditary right was first promulgated, in order to justify their claims to the throne,[2] owed their success far less to that doctrine than to their intense personal popularity, their descent in the male line from Edward III., and the dislike which Henry VI. and his consort Margaret had excited amongst the people. The war of the Roses was not simply a dynastic contest. It arose from various causes, ecclesiastical, social, and political. The House of York placed itself at the head of the popular party in resisting the ecclesiastical and aristocratic policy with which the House of Lancaster had ultimately become identified, and by so doing gained a degree of power and influence which no mere genealogical claim would have afforded it. The right of Parliament to decide the question of succession was tacitly admitted by

House of York.

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[1] 7 Hen. IV. c. 2, in Statutes Revised, i. 278. Its proper date is 8 Hen. IV., as given in Rymer, viii. 462, and in the exemplification in Rot. Parl. iii. 581. The enacting words as therein set out run: De consilio, concensu expresso et spontaneo, ac instanti Petitione, omnium et singulorum Prelatorum et Procerum, ac Communitatis et universitatis Regni nostri in presenti Parliamento nostro, Volumus, ordinamus, et statuimus, quod Hereditas sive Hereditacio, Corone nostre, ac Regnorum nostrorum Anglie et Francie, ac omnium aliorum Dominiorum nostrorum ultra mare, cum omnibus eorum pertinentiis, Nobis, et Heredibus de corpore nostro exeuntibus resideat. Ac ulterius in speciali, ad requisicionem et de assensu predicto, ordinamus, pronunciamus, decernimus, et declaramus, prefatum Principem Henricum filium nostrum primogenitum Heredem nostrum apparentem, Nobis in Corona, Regnis, et Dominiis predictis successurum. Habend' cum omnibus pertinentiis suis post decessum nostrum sibi et Heredibus de corpore suo exeuntibus: Ita quod si ipse sine herede de corpore suo exeunte obierit, tunc predicta Corona, Regna, et Dominia, cum omnibus pertinentiis suis, Thome secundo filio nostro et Heredibus de corpore suo exeuntibus remaneant. Et si ipse, &c. Similar remainders to John, the 3rd son, and Humphrey, the 4th son, and the heirs of their bodies.

[2] 'The crown having been entailed by Act of Parliameut (7 Hen. IV. c. 2) on Henry IV. and his issue, the House of York saw itself totally excluded, unless its pretensions could be supported by a title *paramount to the power of Parliament.* Proximity in blood was its only refuge, and to that the partisans of that house resorted.'—Sir Michael Foster, Crown Law, p. 403.

Richard Duke of York himself, when, in 1460, he personally urged his claim before that assembly, and accepted a compromise confirming the Crown to Henry VI. for life, and acknowledging Duke Richard as heir apparent in place of Henry's son.[1] From the day of the battle of Wakefield (23 Dec., 1460), when Richard of York was slain, King Henry was regarded by the adherents of the White Rose as having forfeited the Crown through his breach of the Parliamentary compromise. He was deposed by an assembly of Yorkist prelates and barons at London, on the 3rd of March, 1461; and Edward, son of the late Duke of York, was elected King, as well by the select assembly as by a popular vote of soldiers and citizens assembled in St. John's fields, Clerkenwell. On the 4th he went in procession to Westminster and was proclaimed King as Edward IV.[2] The Crown was in reality seized

Deposition of Henry VI. and election of Edward IV.

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[1] Rot. Parl. v. 375. Among the objections drawn up and formally propounded by the Lords in answer to the Duke of York's claim, was the assertion that the statutes settling the crown on the House of Lancaster were of so high authority 'as to defeat any manner of title made to any person.'—*Ibid.* p. 376.

[2] 'By the advice of the Lords Spiritual and Temporal, and by the election of the Commons.' Gregory, Chron. p. 215. Hall, (Chron. p. 253) says: 'After the lordes had considered and weyghed his [Edward's] title and declaracion, they determined by authoritie of the sayd counsaill, for as much as Kyng Henry, contrary to his othe, honor and agreement, had violated and infringed, the order taken and enacted in the last Parliament, and also, because he was insufficient to rule the Realme, and inutile to the common wealth, and publique profite of the pore people, he was therfore by the aforesayd authoritie, depriued and deiected of all kyngly honor, and regall souereigntie. And incontinent, Edward erle of Marche, sonne and heyre to Richard duke of Yorke, was by the lordes in the sayd counsaill assembled, named, elected, and admitted, for kyng and gouernour of the realme: on which day, the people of the erles parte, beyng in their muster in sainct Ihons felde, and a great number of the substanciall citezens there assembled, to behold their order: sodaynly the Lord Fawconbridge, which toke the musters, wisely declared to the multitude, the offences and breaches of the late agremente done and perpetrated by Kyng Henry the VI. and demaunded of the people, whether they woulde have the sayd Kyng Henry to rule and reigne any lenger over them: to whome they with a whole voyce aunswered, nay, nay. Then he asked them, if they would serue, loue, and obey, the erle of March as their earthly prince and souereign lord. To which question they aunswered, yea, yea, crieng, King Edward, with many great showtes and clappyng of handes.' After attending a *Te Deum* at St. Paul's, Edward proceeded to Westminster Hall, and sitting with the sceptre royal in his hand, in the presence of a great number of people there assembled, 'his title and clayme to the croune of England, was declared by ii maner of ways; the firste, as sonne and heyre to duke Richard his father, right enheritor to the same: the second, by aucthoritie of Parliament and forfeiture committed by Kyng Henry. Whereupon it was agayne demaunded of the commons, if

by Edward *flagrante bello*, and it was not until after his victory at Towton on the 29th of March, which put an end to all competition, that he can be said to have obtained actual possession of the sovereignty. His first Parliament, however (whose meeting was delayed by the troubled state of the Kingdom till the 4th November), adopting the Yorkist theory of indefeasible hereditary right, found no difficulty in fixing the commencement of his reign at the 4th of March, and in declaring the sovereigns of the House of Lancaster to have been usurpers and 'pretensed Kings.'[1]

During the brief Lancastrian restoration (October, 1470—April, 1471) the Crown was re-settled by Parliament on Henry VI. and his issue male, with remainder, in default of such issue, to George, Duke of Clarence, brother of Edward IV., and his heirs.[2]

Richard III. 1483.

Whatever may be thought of the claim of Richard III.,[3] it appears certain that his accession was in accordance with the wishes of the main body of the nation, and, like

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they woulde admitte, and take the sayd erle as their prince and souereigne lord, which al with one voice cried, yea, yea.' Hall's Chronicle was published in 1548. The author was a scholar of Eton and recorder of London. He died in 1547. Although not a contemporary authority, much of his information was derived from the recollections of his grandfather, David Halle, a constant attendant of Richard, Duke of York.

[1] 1 Edw. IV. c. 1.

[2] 'That if the said Herry, and Edward his first begoton son, died without Issue Male of theire Body, that the said Duke and his Heires, should be Kynge of this Lande.' Rot. Parl. vi. 194. This Act is known only by the reference to it in the statute (17 Edw. IV., 1468), by which it was repealed. The petition of the Commons on which the repealing statute is founded is curious, and well brings out the Yorkist theory: 'That where in your moost dolorous absence oute of this your Reame, in the parties of Holond beyng, and afore your moost victorious regresse into this same your Reame, in a pretensed Parlement, unlawfully and by usurped auctoritie summoned and called by your Rebell and Ennemye Henry the VIth, late in dede and not in right Kyng of Englond, holden here at your Paloys of Westm', the xxvi day of Novembr', the ixth yere of your moost noble reigne, under the colored title of the said Henry from the begynnyng of this pretensed reigne xlixti, and of the readeption of his usurped power and estate the first, dyvers and many maters were treated, commoned and opened, to the anyntifying and disheritaunce of You, Soveraigne Lord, and of your Roiall bloode,' &c. [Rot. Parl. vi. 191.—Ed.]

[3] Richard III. founded his claim on (1) an alleged pre-contract of marriage of Edward IV., which rendered his issue by 'dame Elizabeth Gray' illegitimate; (2) the attainder of the Duke of Clarence, by which his children were debarred from the succession; and (3) the misgovernment of Edward IV.—Rot. Parl. vi. 240, 241.

Edward IV., he was acknowledged by a show of popular election.[1] The 'many and divers lords spiritual and temporal and other nobles and notable persons of the commons, in great multitude,' who, on the 25th of June, 1483, presented a roll of parchment to Richard inviting him to accept the Crown, professed to act 'on the behalf and in the name of the Three Estates of this realm of England,' and declared that they had 'chosen him into their King and Soveraigne Lord, to whom they knew for certain it appertained of Inheritance so to be chosen.'[2] The dangers of a long minority, and a wide-spread jealousy of the Woodville family, would seem to have caused the claims of the uncle to prevail, for the last time in English history, over those of a boy nephew. His first and only Parliament, after reciting that neither the said Three Estates, nor the persons acting in their name had been 'assembled in form of Parliament,' and 'how that the Court of Parliament is of such authority and the people of this land of such nature and disposition, as experience teacheth that manifestation and declaration of any truth or right made by the Three Estates of this Realm assembled in Parliament, and by authority of the same, maketh before all other things most faith and certainty,' proceeded to declare Richard 'very and undoubted, King of this realm of England, as well by right of consanguinity and inheritance as by lawful election, consecration, and coronation;' and entailed the Crown on the heirs of his body, particularly his son Edward, Prince of Wales, who was thereby declared heir apparent.[3]

The Crown entailed by Parliament on the issue of Rich. III.

Henry VII. 1485.

Henry Tudor, who in default of a legitimate heir of the house of Lancaster, was recognised, without any legal hereditary claim, as the head of the Lancastrian party, obtained the Crown partly by the victory at Bosworth (22 August, 1485), but mainly by the general acquiescence of the nation. His best and only legal title was the Act of

The Crown is entailed by

[1] Hall, Chron. 372.
[2] Rot. Parl. vi. 240, 241.
[3] Rot. Parl. vi. 240–242.

Parliament by which it was 'ordained and enacted by the assent of the Lords and at the request of the Commons that the inheritance of the crowns of England and France, and all dominions appertaining to them, should remain in Henry VII. and the heirs of his body for ever, and in none other.'[1] 'Words,' remarks Hallam, 'studiously ambiguous, which, while they avoid the assertion of an hereditary right that the public voice repelled, were meant to create a parliamentary title, before which the pretensions of lineal descent were to give way.'[2] Henry VII. was, in fact, made by Parliament the stock of a new dynasty,[3] to the exclusion of the whole house of York; but the hereditary claims of that house were happily merged in the Parliamentary title of the Tudors by the subsequent marriage of the King with the daughter of Edward IV.

Parliament on him and his issue.

In the reign of Henry VIII. the succession to the Crown was repeatedly altered by legislative enactment.

Parliamentary settlements of the succession in the reign of Henry VIII.

(1) By the Royal Succession Act of 25 Henry VIII., c. 22, passed on the occasion of the King's marriage with Anne Boleyn, the Crown was entailed on the King's issue male, 'and for Default of such sons of your Body begotten, . . . that then the said Imperial Crown . . . shall be to the Issue Female between your Majesty and your . . . most dear and entirely beloved Wife Queen *Anne* begotten, that is to say, first, to the eldest issue Female, which is the Lady *Elizabeth*, now Princess . . . and so from Issue Female to Issue Female, and to the Heirs of their Bodies, one after another, by Course of Inheritance, according to their Ages, as the Crown of England hath been accustomed and ought to go, in Cases when there be Heirs Females to the same.'

25 Henry VIII. c. 22.

(2) Subsequently to the King's marriage with Lady Jane Seymour, Parliament, in the plenitude of its sovereign authority, passed an Act[4] by which (after declaring the

28 Henry VIII. c.

[1] 1 Hen. VII. c. 1.
[2] Const. Hist. i. 8.
[3] The words of the Act settling the Crown upon Henry VII. have been substantially carried out, every subsequent sovereign of England having been a descendant—although not, since the Revolution, 'heir'—of his body.
[4] 28 Hen. VIII. c. 7. [Not in Ruffhead, *Statutes at Large*.—Ed.

King's marriage with Queen Katherine void, and his marriage with Anne Boleyn likewise void, and the issue of both marriages illegitimate) the Crown was entailed on the sons of the King and Queen Jane successively and the heirs of their bodies, with remainder to the King's sons by any future wife in like manner, and on failure of such issue, to the daughters of the King and Queen successively and their issue. And after reciting, that if the King should die without lawful issue, no provision having been made in his lifetime touching the succession, the realm in that case would be destitute of a lawful governor, 'or else percase incumbered with such a person that would covet to aspire to the same, whom the subjects of this realm shall not find in their hearts to love, dread, and obediently serve as their sovereign lord,'[1] the Act proceeds to bestow upon the King the extraordinary power, in default of lawful issue of his body, to limit the Crown, by letters patent, or by his last will made in writing and signed with his hand, to such person or persons in possession or remainder, and after such order or condition, as he should judge expedient. Not even a preference for persons of Royal descent was reserved, but it was declared that the persons so to be appointed should enjoy the Crown 'as if they had been lawful heirs to the same, or as if the crown had been given and limited to them plainly and particularly by special names and sufficient terms, by full and immediate authority of the High Court of Parliament.'[2]

The King empowered by Parliament to limit the succession by letters patent or by his last will.

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[1] 'This seemeth to be pointed at James V. of Scotland, who was at this time the next in succession upon the failure of the king's issue; not barely as being descended from the union of the two roses, but under the parliamentary entail in favour of Henry VII. and the heirs of his body made before that union took place. . . . Notwithstanding the near relation the house of Stuart stood in to the crown of England, Scotland was, during all King Henry's reign, the same detested enemy it had been for ages past: and a national prejudice operated in both kingdoms as strongly as ever.'—Sir M. Foster, Crown Law, 406.

[2] These alternatives, 'as if they had been lawful heirs,' or 'as if the crown had been given by Parliament,' indicate the two principles upon which the succession has rested since the Crown ceased to be purely elective. Sir Michael Foster (Cr. Law, 408) enunciates them thus: 'That, no Act of the Legislature intervening, the crown and royal dignity ought to descend from ancestor

(3) By a later Act,[1] after reciting the previous statute, Henry's two daughters, Mary and Elizabeth, were put into the entail next after the lawful issue male or *female* of the King and Prince Edward, but subject to such conditions as the King should, by letters patent or his last will, appoint. In the event of their failing to perform the conditions, or dying without issue, the King was again empowered to limit the succession as by the last Act.

35 Henry VIII. c. 1.

The second Succession Act had declared Mary and Elizabeth to be illegitimate. The third, upon a supposition of their illegitimacy, now postponed them even to all the lawful issue *female* of the King: but yet, in default of lawful issue of the King and Prince Edward, it limited the Crown to the illegitimate daughters of the King and their issue in preference to all the other descendants of Henry VII.[2]

In exercise of the power given to him by these Acts of Parliament,[3] Henry VIII. devised the Crown, in remainder, on failure of issue of his three children, to the heirs of the body of his younger sister, Mary, Duchess of Suffolk, thus postponing the descendants of his elder sister, Margaret, Queen of Scots.[4]

Henry VIII. devises the Crown.

Edward VI., Mary, and Elizabeth, succeeded each other on the throne in strict accordance with, and by virtue of, the Parliamentary entail. On the accession of Queen Mary an Act was passed (1 Mary, sess. 2, c. 1.) repealing, as far

Act passed on the accession of Queen Mary

to heir in a certain established course of descent; but that this course of descent is subject to the controul of the legislature.' When the deposition of a reigning sovereign is necessary—as in James II.'s case—the 'Legislature' must be taken as synonymous with the 'Estates of the Realm.'

[1] 35 Hen. VIII. c. 1, strongly enforced by 1 Edw. VI. c. 12.

[2] The legitimacy of each of the daughters of Henry VIII. was liable to dispute, and it is impossible, on any theory, to support the legitimacy of both. Their illegitimacy was however taken out of the ordinary category by the fact that the mother of each was acknowledged as a lawful wife at the time of the daughter's birth.

[3] 'The full and immediate authority of the legislature in the matter of the succession must have been presupposed as a matter past all dispute; otherwise a delegation of that authority would have been no better than an idle, vain, and ineffectual parade, an insult upon common sense and an affront to the king himself.'—Sir Michael Foster, Crown Law, 410.

[4] On the validity of the execution of Henry VIII.'s will, see Hallam, Const. Hist. i. 34, 289, 294, Lingard, Hist. Eng. vi. 213 [and Bailey, *Succession to Eng. Crown*, 156–64].

as concerned herself, all the Acts which stood in the way of her legitimacy, and declaring the marriage of her father and mother valid, the sentence of divorce a nullity, and that she was the legitimate issue of the King.

Queen Elizabeth's title.

On the first notice of Mary's death, Elizabeth was proclaimed, by order of the House of Lords then sitting, true and lawful heir to the crown *according to the act of succession of the* 35*th year of Henry VIII.*[1] Whatever other title the Queen might be presumed to have, her Parliamentary title was clearly the one on which she relied. Discarding the precedent set by her sister, she suffered all altercation about the marriage of her father and mother, and the subsequent divorce, to sink into oblivion. The Act passed on her accession, though vaguely asserting in general terms her descent from the blood Royal, and that she was as fully entitled as her father or brother had been (which was perfectly true, since each reigned by a good Parliamentary title), declared in guarded and limited terms that she was as fully entitled as her sister was at any time *since the statute of the* 35*th year of King Henry VIII.*[2]

Act passed on her accession.

It is made treason by a statute of Elizabeth, to deny the power of Queen and Parliament to limit the succession.

So completely established, in the time of Elizabeth, was the power of Parliament to alter the line of succession, that it was expressly enacted by statute that if any person should affirm or maintain that the Laws and Statutes did not bind the Right of the Crown and the Descent, Limitation, Inheritance, and Governance thereof, his offence should be High Treason. To affirm, by any Book or Work written or printed (before the same should be established by Parliament), that any one particular Person was or ought to be Heir and Successor to the Queen, involved imprisonment, and for the second offence, a *Præmunire.*[3]

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[1] Sir M. Foster, Crown Law, 409.

[2] 1 Eliz. c. 3. 'This declaration so guarded and limited seemeth strongly to imply, either that in the judgment of Parliament Queen Mary had no title antecedently to that act (35 Hen. VIII.), or that Elizabeth, having no other, it was thought but decent to put the sisters upon an equal footing, as former Parliaments had done.'—Sir M. Foster, Crown Law, 412.

[3] 13 Eliz. c. 1. The penalty for every person so affirming or maintaining *after the decease of the Queen*, was forfeiture of goods and chattels only. This

On the death of Elizabeth, the Council of the late Queen proclaimed as her successor James, King of Scots, the heir of Margaret, elder sister of Henry VIII. As the claim of the House of Suffolk under the will of Henry VIII., and the Acts of Parliament authorising him to dispose of the Crown, was legally indisputable,[1] the first King of the House of Stuart was in the eye of the law a usurper. But the proclamation of the Council, which in itself could give no right, was voluntarily ratified by the popular voice;[2] and after the ceremony of his coronation had been performed, an Act of his first Parliament[3] made him, what he had not up to that time been, a legitimate sovereign.

James I. 1603.

James I. was the twenty-third occupant of the English throne since the death of William the Conqueror. Of that

Doctrine of indefeasible hereditary right.

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clause as to the power of Parliament in the matter of the succession was, in substance and with almost identical words, revived and re-enacted by the 4th of Anne, c. 8, and the 6th of Anne, c. 7. Another section of the Act of Elizabeth enacted that whoever during the life of the Queen should by writing or printing declare *before the same be so established and affirmed by Act of Parliament* that any person in particular except the issue of her Majesty, was or ought to be right heir or successor to the Queen, should for the first offence suffer imprisonment for a year and forfeit half his goods, and for the second incur the penalties of præmunire. Neither the claims of the House of Suffolk nor of the House of Stuart were affected by this section. It merely shows, remarks Sir Michael Foster, 'that the eventual right of any individual, though grounded on common or statute law, was judged a question too big for ordinary discussion and proper only for the discussion of the legislature.'

[1] [This strong expression is left as it was written. But Mr. Alfred Bailey's more guarded language, in his interesting work on *The Succession to the English Crown* (1879), should be read alongside, where he says (*op. cit.*, pp. 163–4) of the alleged Will, 'It is sufficient to treat the instrument as it appeared to our forefathers in connection with the succession to the throne. Its authenticity, or at least its validity, was questioned. If genuine, it shifted the succession from the descendants of the elder of Mary's sisters to those of the younger. Thus it hung like a cloud over the prospect of the succession to the crown during the whole of Elizabeth's reign, and even after the accession of the Stuart line, when it had been treated as a piece of waste paper, it affected powerfully and fatally the policy of the new dynasty.' How it so affected the policy of the Stuart kings is shewn by Hallam, Const. Hist. i. 294.—Ed.]

[2] 'What renders it absurd to call him [James] and his children usurpers? He had that which the flatterers of his family most affected to disdain—the will of the people; not certainly expressed in regular suffrage or declared election, but unanimously and voluntarily ratifying that which in itself could surely give no right, the determination of the late Queen's Council to proclaim his accession to the throne.'—Hallam, Const. Hist. i. [289].

[3] 1 Jac. I. c. 1.

number, twelve had succeeded to the throne not being legal heirs of the Conqueror, according to the doctrine of primogenitary succession, and three more, although legal primogenitary heirs, had not succeeded in the regular course of descent.[1] Edward II. and Richard II. had been solemnly deposed by Parliament, and on the latter occasion the throne itself was declared to be vacant.[2] The line of succession had on several occasions been altered, as we have seen, by the authority of Parliament. Yet in the teeth of these facts, the lawyers and divines of the Stuart period laboured to establish the doctrine of an indefeasible hereditary right to the Crown.[3] But even the ultra-royalist and reactionary House of Commons under Charles II. attempted

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[1] The twelve not primogenitary heirs of the Conqueror were: William II., Henry I., Stephen, John, Henry III., Henry IV., Henry V., Henry VI., Richard III., Henry VII., Mary, Elizabeth. The three who although primogenitary heirs did not succeed in the regular course of descent were: Henry II., Edward III., Edward IV. To these latter we ought to add James himself: for since Mary and Elizabeth had both been declared illegitimate by Act of Parliament, and since in any case one of them must have been so, the hereditary right of James, as well as that of his mother Mary Queen of Scots, had, in the view of the upholders of indefeasible primogenitary succession, been postponed to a mere Parliamentary title.

[2] Ut constabat de praemissis, et eorum occasione, regnum Angliae, cum pertinentiis suis, vacare.—Walsingham, ii. 237.

[3] [It is somewhat remarkable that since the publication both of Mr. Bailey's valuable work on *The Succession*, and the last edition of the present book, a certain activity of assertion of the doctrine of Hereditary right, and a treatment of Mediæval English History in accordance therewith, and out of accord with the Constitutional doctrine laid down by Prof. Taswell-Langmead and Mr. Bailey, should be manifesting itself. The circumstance that one who has recently penned statements re-asserting the thesis of the Stuart 'lawyers and divines' is a member of the College of Arms lends an apparent importance to the language of Chester Herald, which seems to render it necessary for the present Editor to state that he is at one alike with his old friend the author of this book and with Mr. Bailey, in their general view of the true Constitutional doctrine, which combined the Elective and the Hereditary principles by treating the Succession as open, within the limits, in ordinary cases, of a given Royal House. But that in extraordinary cases, the power of Election was unlimited, is evident from the cases of the Danish Kings, and of Harold, as well as of William the Conqueror, who clearly went through the form of an election, however little weight he may have personally attached to it. Nor did the creation of a new Royal stock at the Norman Conquest work any change in the old English doctrine, which William's own action had publicly and solemnly recognised at his Coronation. It was possible for King and magnates to agree as to the King's successor, as was arranged at the Peace of Wallingford in the case of Stephen and Henry Fitz Empress. But there was no room, Constitutionally speaking, for such a person as an Heir Presumptive to the Crown in the days of John, as is asserted of Eleanor of Brittany by H. Murray Lane, Chester Herald, in *Notes and Queries*, 7th s. vii. 221.—ED.]

to assert the right of Parliament to alter the succession by twice passing, in 1679 and 1680, the Bill for the exclusion of the Duke of York from the throne. At length in 1688, all doubts as to the power of Parliament to regulate the succession as it should think fit, were finally set at rest by the 'glorious revolution' which overturned the Stuart dynasty, and once more set an elective king upon the throne. Both houses of the Convention Parliament concurred in a resolution 'That King James II. having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people,[1] and having by the advice of jesuits and other wicked persons, violated the fundamental laws, and withdrawn himself out of the kingdom, has *abdicated* the government, and that the throne is thereby *vacant*.'[2] In the Declaration of Rights, the final resolution to which both Houses came on the 13th of February, it was determined 'That William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the crown and dignity of the said kingdoms and dominions to them the said Prince and Princess, during their lives and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess during their joint lives; and after their decease the said crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said Princess; for default of such issue, to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, the heirs of the body of the said Prince of Orange.'[3]

Revolution of 1688.

Deposition of James II

Election of William of Orange.

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[1] The 'original contract' between King and People which is here solemnly asserted, is as utterly devoid of historic foundation as the opposite principle of 'divine right,' but, in the words of the late Dr. Whewell, 'it may be a convenient form for the expression of moral truths.'—See Maine, Ancient Law, p. 347.

[2] Commons' Journals; Parl. Hist.

[3] This declaration was afterwards embodied and confirmed in the Bill of Rights (1 Will. and Mary, sess. 2, c. 2) with the further important restriction

Act of Settlement.

Queen Mary died in 1694 without issue, and William, in accordance with the Act for settling the succession to the Crown, became sole ruler. On the death, in 1700, of the young Duke of Gloucester, son of the Princess Anne of Denmark, the manifest probability that the entail established would come to an end at the decease of the King and the Princess Anne, rendered it again necessary that Parliament should exercise its power of settling the succession. Its freedom of choice was unlimited. The Resolution of the Convention Parliament which declared the throne of James II. to be 'vacant,' abrogated by implication the hereditary right to the succession previously existing in the descendants of Henry VII. But the wisdom was obvious of deviating no further than the welfare of the nation absolutely demanded from the old hereditary line. Passing over therefore the children of James II.; the Duchess of Savoy, daughter of Henrietta, Duchess of Orléans; and the elder children of Elizabeth, wife of the Elector Palatine; Parliament selected the Electress Sophia of Hanover, the nearest heir who professed the Protestant faith, as the root of a new Royal line. By the Act of Settlement,[1] all prior claims of inheritance, save the existing entail in favour of the issue of the Princess Anne and of King William being set aside and annulled, the Crown was settled on the 'Princess Sophia, Electress and Duchess Dowager of Hanover, daughter of the most

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that all persons who shall profess the Popish religion or marry a Papist, shall be excluded and for ever incapable to inherit, possess, or enjoy the crown and government of this realm; and in all such cases the people shall be absolved from their allegiance, and the crown shall descend to the next Protestant heir. (*Infra*, ch. xv.) Hallam (Const. Hist. iii. [98]) thus sums up the changes effected by the Convention Parliament: It 'pronounced, under the slight disguise of a word unusual in the language of English law, that the actual sovereign had forfeited his right to the nation's allegiance. It swept away by the same vote the reversion of his posterity and of those who could claim the inheritance of the crown. It declared that, during an interval of nearly two months, there was no King of England; the monarchy lying, as it were, in abeyance from the 23rd of December to the 13th of February. It bestowed the crown on William, jointly with his wife indeed, but so that her participation in the sovereignty should be only in name. It postponed the succession of the princess Anne during his life. Lastly, it made no provision for any future devolution of the crown in failure of issue from those to whom it was thus limited, leaving that to the wisdom of future parliaments.'

[1] 12 & 13 Will. III. c. 2, *infra*, ch. xvi.

excellent Princess Elizabeth, late Queen of Bohemia, daughter of our late sovereign lord King James the First of happy memory,' and 'the heirs of her body being Protestants.'[1]

Recapitulation.

Taking a brief retrospect of the ground travelled over in this chapter, and summing up the results of the detailed investigation in which we have been engaged, the facts as to the succession to the Crown may be broadly stated as follows:—

In its origin the Kingship of the English was distinctly elective, but with a restriction of choice, in all ordinary cases, to the members of one Royal house. At the Norman Conquest a new Royal stock was substituted for the ancient line of Cerdic, but the elective character of the Kingship continued unaltered. In form the election was, indeed, presently modified by the prevailing Feudalism, and the vote of the Witenagemot was then represented by the proffered homage and fealty of the magnates of the Realm. But in addition to election, the ecclesiastical ceremony of coronation was throughout essential to the acquisition of the regal status, and in the coronation service the form of election was again gone through, nominally, this time, by the whole people. The accession of Edward I. marks the earliest important innovation. He was the first King who reigned before his coronation. The doctrine of hereditary right, which gradually arose as the personal idea of Kingship was superseded by the territorial idea, had now largely obscured the elective character of the Kingship, and its true nature as an office or trust as distinguished from a mere descendible property. But this obscuration was never total. The hereditary right of the heir was not a right to succeed as to an estate, but a right to be elected King. Its nature was well expressed by the representatives of the Three Estates when they declared to Richard III. in 1483 that they had 'chosen him into their King to whom

[1] A provision settling the reversion to the crown on the Electress Sophia had been inserted, by the House of Lords, in the Bill of Rights, but the Commons rejected it without a division. Parl. Hist. v. 339

they knew it appertained of inheritance so to be chosen.' The difference, though apparently a slight one in its practical effect, in reality is of considerable importance as marking the persistence of the elective and fiduciary character of the Kingship.

Edward I. had been recognised as King four days after the death of his father. The accession of Edward II. on the day following his father's decease marks a further advance in the hereditary doctrine: an advance, however, which was more than neutralised by the revival, against his person, of the right of the National Assembly to depose the King. By the unopposed succession of Richard II. to the exclusion of his uncles, the right of representative primogeniture was for the first time asserted in the devolution of the Crown. But as in the case of Edward II., so in the case of Richard, no sooner had the doctrine of strict hereditary descent progressed another step, than it was met by the reassertion of the right of Parliament to depose the sovereign, and by the negation of any indefeasible right of primogeniture, through the election of Henry of Lancaster.

It was by the House of York, who were themselves the real 'usurpers' of the throne, that the doctrine of indefeasible hereditary right was first propounded in its full force and significance. The Crown seems to have been by them actually regarded as a private estate for their own personal benefit. Yet even Edward IV. sought and obtained a Parliamentary confirmation of his title: and when, a quarter of a century later, the Crown was settled by Parliament on Henry VII. and his issue, to the exclusion of the whole House of York, the Kingship was replaced on its elective basis.

The elective right of Parliament, however, was now exercised not periodically on the death of each sovereign—hereditary succession having been the normal rule from the accession of Edward II. at the latest—but whenever it became necessary to elect a new Royal stock, as in the case of Henry IV. and of Henry VII. By the marriage of Henry VII. with Elizabeth of York, what may be termed

the 'legitimate' claims of that house were transmitted to all her descendants; yet the right of Parliament to alter the succession was never more signally asserted than in the Act which conferred upon King Henry VIII. unlimited power to nominate his successor. James I., coming to the throne without a legal title, attempted to revive the Yorkist theory of hereditary right. In the recitals of the Act of Parliament by which the Crown was settled upon him, care was taken to carry back his pedigree to Elizabeth, daughter of Edward IV. and to omit all mention of the entail upon Henry VII. and his issue. But the theory of indefeasible hereditary right, fortified as it was by the Stuart addition of a sanction *jure divino*, utterly failed to take permanent root: and was finally extirpated by the Revolution of 1688 and the subsequent Act of Settlement, which entailed the Crown on the descendants of Sophia of Hanover. In that statute, Parliament, for the last time in our history, exercised its paramount right to settle the succession to the Crown; a right founded not only in reason, but in the ancient principles of our Constitution, and supported by long usage and a uniformity of theory and practice for centuries prior to the Revolution.[1]

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[1] On the subject of this chapter, reference may be made to an interesting monograph on 'The Succession to the English Crown' (1879), from the pen of Mr. Alfred Bailey, M.A., of Lincoln's Inn, a former Stowell Civil Law Fellow of University College, Oxford, whose views coincide in the main with those expressed in the text. [Besides the careful analysis to which the whole question has been subjected by Mr. Bailey, his book contains a number of useful genealogical tables, not to be met with in the ordinary historical text-books. It should not be forgotten, when the absence of a "legal" title to the Crown is insisted upon, as above, in the case of James I., that the Act conferring upon Henry VIII. the special testamentary powers which it is alleged that he exercised, may itself have been, as some have held it, *ultra vires*. On the Electress Sophia, cf. *Edinb. Rev.*, Jan. 1890, Art. *A Hanoverian Marriage*, for a suggestion, made in Beaucaire's *Eléonore d'Olbreuze, Duchesse de Zell* (Paris, 1884), that the Duchess of Zell had some hand in inducing William III. to recommend the settlement of the crown of England on the Electress Sophia and her descendants. William III. visited Zell 'as an old friend,' in 1688. The letter from Leibnitz, quoted *loc. cit.*, certainly states the negotiations of the Duchess as a fact.—ED.]

CHAPTER VII.

ORIGIN OF PARLIAMENT.

A *Commune Concilium Regni* has always existed.

ENGLAND has never been without a National Assembly, a '*Commune Concilium Regni*,' by whose 'counsel and consent' the work of government has been carried on. But, whilst retaining its corporate identity, the name, powers, and constitution of this assembly have varied from time to time. The nature and functions of the old English Witenagemot have been already sufficiently described.[1] After the Norman Conquest, the Witan still continued to be summoned, as before, to give counsel and consent on the promulgation of a new law, or the imposition of a new tax; but owing alike to the infrequency of legislation under the Norman kings, and to the predominance of the Royal power, the legislative functions of the assembly must have been formal, rather than real. As the Feudal principle gradually acquired predominating influence in every department of the state, the Meeting of the Wise almost insensibly changed into the *Curia Regis*, the court of the King's feudal vassals. All immediate tenants of the Crown by military service, however small might be their holdings, had originally a personal right to be summoned to the Common Council of the Realm whenever the King wished to impose any extraordinary aid, and probably on other occasions also. The Bishops and principal abbots continued to be summoned without any intermission, though their ancient character of Witan appears to have become

Witenagemot.

Curia Regis.

Its constitution.

[1] *Supra*, pp. 33–38.

gradually merged in that of feudal barons. The Earls also, who were 'at all times and without exception indisputably noble,'[1] never lost their right to attend. But as regards all other military tenants *in capite*, although Constitutionally members of the *Commune Concilium*, it is highly probable that the King early assumed the power of selecting the persons to whom writs of summons should be addressed.[2] Thus the same indefiniteness and uncertainty which had characterised the constitution of the Witenagemots continued as a feature of the feudal Great Councils. With the exception of the famous Gemot of Salisbury in 1086, which was attended not only by the Witan but by all the landowners of the kingdom,[3] whether tenants-in-chief or not, and the similar general muster of landowners held by Henry I. at Salisbury in 1116,[4] the complete assembly of all the tenants-in-chief can hardly ever have taken place.[5] Still, the personal right always subsisted; and it was the infringement of this right, when Councils were summoned for the purpose of granting extraordinary aids, which led to the provision in John's Magna Charta, by which the King promised on such occasions to summon all tenants *in capite*, the archbishops, bishops, abbots, earls, and *majores barones* individually, and the rest generally through the sheriff. This difference in the mode of summons—a difference which had been observed for at least half a century[6] and probably from a still earlier period—is evidence of the inequality then existing among the tenants-in-chief. Though

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[1] Hallam, Midd. Ages, iii. 235.

[2] Report of Lords' Committee on Dignity of a Peer, 1819. See *supra*, p. 59.

[4] Flor. Wigorn. *s.a.* 1116.

[5] 'Henry II. made the national council a different thing from what Henry I. had left it. . . . Its composition was a perfect feudal court: archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders. . . . That towards the end of his reign he found it necessary to limit the number of lower freeholders who attended the councils is very probable; the use of summonses, which prevailed from the first year of the reign, gave him the power of doing this.—Stubbs, Select Chart., Introduction, 22.

[6] In 1164, Archbishop Becket felt himself insulted by receiving a summons to the Great Council in Northampton, not by special writ, but through a common summons directed to the Sheriff of Kent. Will. Fitz Stephen [Rolls ed. iii. 51].

formally recognised by Magna Charta, the right of the inferior tenants-in-chief to attend the National Council must soon have become impracticable through the increase in their numbers (arising from the subdivision of tenures), their comparative poverty, and the personal inconvenience of attending at long distances from home. Thus the ancient National Assembly gradually ceased to be anything more than an assembly of the 'greater barons,' and ultimately developed into a hereditary House of Lords, the Upper House of the National Parliament.[1] The hereditary character of the House of Lords—now long regarded as fixed and fundamental—accrued slowly and undesignedly, as a consequence of the hereditary descent of the baronial fiefs, practically inalienable, in right of which summonses to the National Council were issued. But, in addition to the barons by tenure, the King had always the right, and, at least as early as the reign of Edward I. had acquired the habit, of summoning other persons who held nothing of the Crown by barony. It is certain that a summons was not at first regarded as conferring even a lasting personal right much less one that was hereditary;[2] but by the time that the

The *majores barones.*

Hereditary character of the House of Lords.

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[1] The Lords' Committee (p. 314), speaking of the 15th of Edward III., say: 'Those who may have been deemed to have been in the reign of John distinguished as *majores barones*, by the honour of a personal writ of summons, or by the extent and influence of their property, from the other tenants-in-chief of the crown, were now clearly become, with the earls and the newly-created dignity of duke, a distinct body of men denominated peers of the land, and having distinct personal rights; while the other tenants-in-chief, whatsoever their rights may have been in the reign of John, sunk into the general mass.'

[2] Freeman, Growth of Eng. Const., 61; Hallam [M. A. iii. 125], quoting Prynne's 1st Register, p. 232, says: 'No less than 98 laymen were summoned once only to Parliament, none of their names occurring afterwards; and 50 others, two, three, or four times. Some were constantly summoned during their lives, none of whose posterity ever attained that honour.' For the obscure history of the early baronage, see generally Hallam, iii. 121, 234. Bishop Stubbs has briefly summed up the successive changes in the constitution of the baronage, the chronology of which is far from easy to fix. Originally including all *barones*—that is, all homagers holding directly of the Crown—the baronage was limited: (1) to all who possessed a united 'corpus' or collection of knights' fees held under one title; (2) to those who, possessing such a barony, were summoned by special writ; (3) to those who, whether entitled by such tenure or not, had received a special summons; (4) and finally to those who had become by creation or prescription entitled hereditarily to receive such a summons.—Select Chart., Introductory Sketch, 37. [This account, of course,

custom arose of creating baronies by letters patent (the first instance of which [in England] was the creation of Sir John Beauchamp of Holt as Lord Beauchamp of Kidderminster, in the 10th of Richard II.), the hereditary nature of the baronage, irrespective of tenure, may be regarded as the established rule.[1] Still, the rule has never been without exception. The presence of the Bishops in the House of Lords is at once an exception to the principle of hereditary right, and a continuing witness of the times when such right had no existence. Down to the suppression of the monasteries by Henry VIII., in 1539, while the abbots and priors sat with the Bishops, the spiritual life-peers actually outnumbered the lords temporal; and even after the abbots and priors had been removed, the Bishops alone formed about one-third of the House of Lords.[2] Independently, however, of the spiritual peers, several cases of the creation of lay peerages—

Spiritual peers.

Lay peerages for life.

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must be taken as applying only to England. It would not, as far as the evidence seems to go, be accurate if applied to Ireland, where there are some questions not yet completely solved regarding the status of certain alleged Feudal dignities, called, or claiming to be, Baronies, presumably by tenure. It would be still less accurate if applied to Scotland, which certainly never was divided into knights' fees, and where the lesser Barons continued to be acknowledged as a part of the Baronial order, by the very Act 1427, allowing them to attend in Parliament by representation, and who, as Barons, contested precedence with the Baronets of Scotland and Nova Scotia, on the institution of that order.—ED.]

[1] Lord Redesdale, in the L'Isle peerage case, gave his opinion that from the 5th year of Richard II. a writ of summons, with a sufficient *proof of having sat* by virtue of it in the House of Lords, created a hereditary peerage.—Nicolas's Case of the Barony of L'Isle, p. 200. [The system of creation of Peers by Letters Patent was unknown in Scotland until after the accession of James VI. to the English throne, and was clearly copied from the English practice. The exact date of the first creation of Lords of Parliament in Scotland, *eo nomine*, cannot be asserted with precision, but may be placed with sufficient approach to accuracy at the middle of the fifteenth century. Charter of *Comitatus*, with the designation of the grantee as *Comes* or *Comitissa*, passed an Earldom, and the ancient Earldoms of Scotland, which were of Celtic or Celto-Scandinavian origin, were descendible to heirs general, belonging, as they did, to a period anterior to the general Feudalisation of Scottish Institutions which may be broadly traced to the reign of David I. On these points reference may be made to Riddell's *Peerage and Consistorial Law*, Skene's *Celtic Scotland*, Robertson's *Scotland under her Early Kings*, Burnett's *Exchequer Rolls, Scotland*, and the late Earl of Crawford's *Earldom of Mar*.—ED.]

[2] May, Constitutional History, i. 299. By the profuse creation of peers in recent times, the relative proportion of the Bishops in the House of Lords has been reduced from one-third to less than one-fifteenth.

Dukedoms and Earldoms—for life only[1] occurred between the reigns of Richard II. and Henry VI., but from the latter date, for more than four hundred years, no instance is recorded of any man being admitted to a seat in the House of Lords as a peer for life. In 1856, with the object of improving the ancient Appellate jurisdiction of the Upper House, an attempt was made to re-introduce life-peerages by means of the Royal prerogative. This was defeated, however, by the successful resistance of the House of Lords.[2] After an interval of twenty years, during which the Appellate jurisdiction was at one time actually abolished prospectively, as to England, by the Judicature Act, 1873, two Lords of Appeal in Ordinary were constituted by Act of Parliament, with the rank of baron for life and the right of sitting and voting during their tenure of office only.[3]

Ideas of election and representation familiar to the nation.

As the ordinary tenant-in-chief became gradually merged in the general mass of freeholders, his theoretical right of attending the *Commune Concilium* in person was exchanged for the practical right of electing representatives, who in his name consented to the imposition of taxes. The ideas of election and representation, both separately and in combination, had been familiar to the nation, in its legal and fiscal system, long before they were applied to the constitution of the National Parliament. The English Kingship was always in theory, and to a great extent in

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[1] The cases are collected in the Report of the Committee of Privileges, 1856.

[2] The attempt in 1856 to re-introduce life-peerages in the person of Sir James Parke, late one of the Barons of the Court of Exchequer, created Baron Wensleydale 'for and during the time of his natural life,' was resisted by the Lords, who referred the patent to a Committee of Privileges, and agreed, in accordance with the report of that Committee, 'that neither the letters patent, nor the letters patent with the usual writ of summons in pursuance thereof, can entitle the grantee to sit and vote in Parliament.' In consequence of this decision a new patent was issued creating Lord Wensleydale a hereditary peer of the realm. The resolution of the Lords, remarks Sir Erskine May, 'has since been generally accepted as a sound exposition of constitutional law. Where institutions are founded upon ancient usage, it is a safe and wholesome doctrine that they shall not be changed, *unless by the supreme legislative authority of Parliament.*'—Const. Hist. i. 298.

[3] 39 & 40 Vict. c. 59.

practice, elective. The Bishops and Abbots were supposed to be elected by the clergy, of whom they were the representatives. In the local courts of the hundred and the shire the reeve and four men attended as representatives from each township; and the twelve assessors of the Sheriff represented the judicial opinion of the whole shire. Subsequently, in the system of recognition by jury, as established by Henry II., the principles of election and representation were successively applied to almost every description of business—fiscal, judicial, and administrative. In the four sworn knights summoned by the sheriff to nominate the recognitors of the Grand Assize we have, probably, the first germ of a county representation.[1]

First historical instance of the summons of representatives to a National Council, St. Alban's, 1213.

The first historical instance of the extension to a National Council of the representative machinery which had long existed in the Folkmoot of the Shire is afforded by the Council held at St. Alban's on August 4th, 1213, after John's submission to the Pope, and during his dispute with the Northern barons on the question of foreign service.[2] This assembly was attended not only by the Bishops and Barons, but also by the representative reeve and four men from each township on the Royal demesne. The immediate business to be transacted was the assessment of the amount due by way of restitution to the Church; but several other matters of national importance appear to have been discussed by the assembly. The Justiciar, Geoffrey Fitz-Peter, submitted to the whole body the recent promise of good government made to Archbishop Langton by the King on receiving absolution at Winchester, about a fortnight previously; referred them to the laws of Henry I. as the standard of what that good government should be; and issued an edict commanding the sheriffs and other Royal officers, on penalty of life and limb, to cease from their illegal exactions.[3]

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[1] Stubbs, Select Chart., Introductory Sketch, 24; and see Palgrave, Eng. Commonwealth, ch. viii.

[2] See *supra*, p. 111.

[3] Matt. Paris, p. 239, *s.a.* 1213.

County representation in Parliament: *four instances prior to De Montfort's Parliament of* 1265.

Four instances of summoning representatives of the shires to the National Council are met with prior to De Montfort's celebrated Parliament of 1265, which is sometimes erroneously spoken of as the 'origin of popular representation.'[1] (1) The first occurred during the contest between John and the Barons, when both sides found it necessary to seek the support of the free tenants of the counties. In 1213 (15th of John) the King, by his writ to the sheriffs, directed four discreet knights of each shire to be sent to him at Oxford *ad loquendum nobiscum de negotiis regni nostri.* There is no indication on the face of this writ whether the four knights were to be elected by the county or returned at the discretion of the Sheriff; but as there already existed a recognised machinery for the election, in the County Court, of four knights, to nominate the recognitors in civil suits and the Grand Jury for the presentment of criminals, we may reasonably conclude that the accustomed machinery was now made use of for the novel purpose of county representation in the general assembly. It is probable also that the 14th clause of John's Charter, which promised that the minor barons should be summoned generally by the Sheriff, though it undoubtedly recognized their personal right to attend, was practically interpreted by the light of the county representation system already introduced less than two years previously. If, as we cannot doubt, the County representatives were elected in the County Court, it follows, since all freeholders had a right to attend this court, that the knights of the shire were held to represent not merely the minor tenants-in-chief, but all the freeholders of the shire.[2]

(i.) 7th Nov., 1213: *four knights from each county summoned to Oxford.*

Increased use of elected county representa-

A long interval of forty years elapsed before the presence of representatives of the counties in Parliament is again recorded. But the period is marked by the increas-

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[1] *E.g.* Hallam, speaking of De Montfort's parliament, says, 'almost all judicious inquirers seemed to have acquiesced in admitting this origin of popular representation.'—Middle Ages, iii. 27.

[2] Stubbs, Select Chart., Introd. Sketch, 39, 40. See also, Const. Hist. ii. 225–232.

ing use of representatives elected in the County Court for fiscal and other purposes. Thus, in 1220 and 1225, two writs of Henry III. direct the election of knights for the assessment and collection of subsidies,[1] and in 1226 writs were directed to the sheriffs of eight counties to send to the King, at Lincoln, four knights elected in each county, to make complaints against the sheriffs, concerning an alleged infringement of the Great Charter.[2] To a general assembly of the Barons at London in 1246, the name of Parliament,[3] which had previously been indiscriminately ascribed to assemblies of various kinds, is for the first time given by a contemporary chronicler, Matthew Paris (p. 696). Henceforth it became specially, though not for many years exclusively, the appellation of the National Council.[4]

tives for fiscal and other matters.

Name of Parliament.

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[1] Close Rolls, i. 437; Rymer, i. 177.

[2] Report on Dignity of a Peer, App. i. 4.

[3] [The name of *Parlamentum*, or *publicum parlamentum*, was in use in the Republic of Avignon during the 13th century, for the Plenary Assembly of the People, otherwise called *Concio*, *publica concio*, or *universitas civium*, or *civitatis*, in front of or within the church of Notre Dame des Doms. Cf. *Nouv. Rev. Hist. de Droit*, 1877, p. 188, art. *Coutumes et Règlements de la Rép. d'Avignon*, by René de Maulde. The first *recorded* use of the name Parliament in Scotland is given as 1292, and ascribed to John de Balliol, by Mr. A. Robertson, *Government, Constitution and Laws of Scotland*, p. 67. It was applied to the Great Council of William the Lion by Jordan Fantosme, before Parliament, in the full Constitutional sense, existed either in Scotland or England, and was probably used in a broad, general sense, in the thirteenth century for any assembly which, as at Avignon, could be called Popular or Representative. What Richard de S. Germano, p. 992, calls *Curia generalis pro bono statu regni*, as convoked by the Emperor Frederick II. for the Kingdom of Sicily and Naples at Capua in 1220, De Cherrier, *Hist. de la Lutte des Papes et Empereurs*, II., 263, citing Richard, calls a 'Parlement Général,' and the title is probably fairly appropriate.—Ed.]

[4] In a writ of the 32nd of Henry III. (1247), the expression 'coram rege et toto parliamento' is used.—Rot. Claus. 32 Hen. III. m. 13, dors. Even after the National Council had permanently in 1295 assumed the form of a perfect representation of the three Estates of the Realm, the name of Parliament continued, though improperly, to be applied both to the terminal sessions of the King's Ordinary Council, and to the occasional assemblies of the Magnum Concilium. From these councils the true National Council, the Commune Concilium Regni, is sometimes distinguished by the Chroniclers as *Generale Parliamentum*. A not infrequent term in early use for the sessions of the National Council was the Latin *colloquium*; and 'it is by no means unlikely,' remarks Bishop Stubbs, 'that the name of Parliament, which is used as early as 1175 by Jordan Fantosme [who mentions, l. 288, that the King of Scots held 'sun plenier parlement:'—Ed.] may have been in common use. . . . When the term comes into use it is applied retrospectively; and in a record of the 28th year of Henry III., the assembly in which the Great Charter was granted is mentioned as the "Parliamentum Runimedae."'—Const. Hist. i. 570; ii. 224, 261.

(ii.) 1254: *two knights from each county summoned to Westminster.*

(2) The second instance of County representation in Parliament is met with in 1254, when Henry III. was in Gascony, and in want of men and money. By his direction Queen Eleanor and the Earl of Cornwall, the Regents, issued writs to the sheriffs to cause to come before the King's Council at Westminster two lawful and discreet knights from each county, whom the men of the county shall have chosen for this purpose in the place of all and each of them, to consider, together with the knights of the other counties, what aid they will grant the King in such an emergency. These writs possess both a positive and a negative importance. On the one hand we have it clearly directed that the two knights are to be chosen by the County—that is, in the County Court; that they are to represent the whole county, and are to have a deliberate voice in the assembly; on the other, the absence of any restriction of the elective franchise to tenants *in capite*, or to knights, is sufficient evidence that no such restriction then existed.[1]

Henry III. excites the national opposition.

The utter falseness of Henry III.—who persistently disregarded the Great Charter, notwithstanding his repeated solemn confirmations of it—his devotion to successive sets of foreign favourites, his foolish and expensive attempt to secure the crown of Sicily for his son Edmund, his illegal exactions, prodigality, and support of Rome against the National Church, excited in all classes of his subjects feelings of animosity and resistance equal to, if not exceeding in intensity, those which had inspired the combination against John.

Matters came to a crisis in the Great Council or Parliament, which met at London on the 9th of April, 1258; and after stormy debates, lasting till the 5th of May, the King found himself obliged to submit wholly to the

[1] The words of the writ are: 'quatuor legales et discretos milities de comitatibus praedictis [Bedeford et Bukingeham] *quos iidem comitatus ad hoc elegerint, vice omnium et singulorum eorundem comitatum*, videlicet duos de uno comitatu et duos de alio.'—Lords' Report on the Dignity of a Peer, i. 95, and App. i. p. 13; Select Chart. 367.

guidance of the barons. At their desire he consented to the appointment of a Committee of Twenty-four persons, to be elected, twelve by the barons and twelve by the King, in a Parliament—which the King's friends stigmatised as the 'Mad Parliament'—summoned to meet at Oxford on the 11th of June. To these Twenty-four unlimited power was confided to carry out all necessary reforms. They began by drawing up the set of articles known as the *Provisions of Oxford,* under which all the powers of government were placed in the hands of a kind of representative oligarchy.[1] By a rather complicated process, bearing some resemblance to the Venetian Constitution, each twelve of the twenty-four selected two from the other twelve, and the four thus chosen elected fifteen as a continual Council of State. Another committee of twenty-four was appointed for the special business of treating of the aid required by the King for the war; and in order, as was alleged, to spare the other members the expense of frequent attendance in Parliament (which was to meet three times a year), a third body of 'twelve honest men' was elected by the barons, as representatives of the community, to treat with the King's Council of the common need.[2]

The *Mad Parliament* at Oxford, 1258.

1258.

Provisions of Oxford.

Council of Fifteen.

Committee of Twenty-four for Aids.

Committee of Twelve for parliamentary business.

Although representatives of the shires were not summoned to the Oxford Parliament, the machinery of County representation was [yet] made use of for other purposes under the Provisions, each county being directed to elect 'four

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[1] The government in England has on four occasions been placed for a time in the hands of an oligarchy. In John's reign, the 25 barons of Magna Charta; under Henry III., the Oxford Committee of 24; under Edward II., the 21 Lords Ordainers; and under Richard II. the 5 Lords Appellant. Guizot, treating of the Provisions of Oxford, observes: Les barons qui avaient arraché la Grande Charte au roi Jean avaient essayé, pour se donner des garanties, d'organiser d'avance et légalement la guerre civile, en cas de violation de la charte. Les barons qui dictèrent la loi à Henri III. allèrent plus loin: ils essayèrent d'organiser non la résistance, mais le pouvoir, et de se donner des garanties, non par la guerre, mais par la constitution même du gouvernement. Ne pouvant contenir dans de justes limites l'autorité du roi, ils entreprirent de la lui enlever et de la prendre eux-mêmes; en un mot, de substituer au gouvernement du roi celui de l'aristocratie.—Hist. des Origines du Gouvernement Représentatif, p. 165.

Oligarchies in England.

[2] See the series of documents relating to the Provisions of Oxford in Stubbs, Select Chart. 369–396.

discreet and lawful knights' to inquire into abuses. The application, moreover, of the principles of election and representation to the constitution of the governing body of the kingdom under the Provisions, was probably not without effect in securing popular representation in Parliament. In these Provisions the Barons are designated as 'the party of the commonalty'; and in the proclamation in English of the King's adhesion to the Provisions, he speaks of his councillors as 'chosen by us and by the *landsfolk* of our kingdom';[1] an expression which calls to mind the *landsittende men* who attended King William's Gemot at Salisbury in 1086. It would seem that at least all the landed proprietors of the realm, and not merely the barons, or even the tenants-in-chief, were regarded as represented in the governing council.

(iii.) 1261: *three knights from each county summoned to St. Alban's.*

(3) In 1261 the King openly refused to abide by the Provisions of Oxford, and civil war broke out. During the contest, the confederate Barons summoned to St. Alban's three knights from each county, *secum tractaturos super communibus negotiis regni;* whereupon the King, in opposition, issued other writs directing the sheriffs to enjoin the same knights to repair instead, on the day originally fixed, to the King at Windsor, *nobiscum super praemissis colloquium habituros.*[2]

(iv.) 1264 (4th June): *De Montfort's 1st Parliament. Four knights from each county summoned to London.*

(4) The decisive victory at the battle of Lewes, on the 14th of May, 1264, followed by the surrender of the King and his son Edward, placed the supreme power in the hands of Simon de Montfort. Although the arbitration of St. Louis of France and his award in Henry's favour (23rd of January, 1264) had served only to rekindle the flame of civil war, a proviso was inserted in the 'Mise of Lewes,' referring all controversies between the King and the Barons to the decision of a second arbitration. In the meantime, De Montfort, having placed friendly garri-

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[1] Rymer, i. 378.

[2] Report on Dignity of a Peer, App. i. p. 23; Shirley's Royal Letters of Hen. III. ii. 179.

sons in all the Royal castles, issued writs in the King's name, appointing certain extraordinary magistrates, called guardians of the peace, in every county, and summoning four lawful and discreet knights, *per assensum ejusdem comitatus ad hoc electos pro toto comitatu illo*, to attend the King in Parliament at London, *nobiscum tractaturi de negotiis praedictis*.[1]

Simon de Montfort founder of the House of Commons.

If not 'the founder of representative government in England,' as Guizot has termed him, Simon de Montfort may justly be regarded as the 'founder of the House of Commons.'[2] An assembly of knights of the shire, exclusively representing the 'landsfolk' of the kingdom, and closely united by descent, interest, and sympathies with the great barons, could never have formed a really Popular Chamber, entitled to speak in the name and on behalf of the whole commonalty of the realm. To Simon, Earl of Leicester, belongs the lasting glory of having been the first to admit within the pale of our political constitution the really popular and progressive Burgher class, which, together with the freeholders of the counties, constituted henceforth the newly-developed Third Estate of the realm.[3] This 'bold and happy innovation' was effected on the 14th of December, 1264 (49th Henry III.), when De Montfort, in the name of the captive King, summoned his famous Parliament to meet at London on the 20th of the following January.[4] Writs were issued to all the sheriffs

De Montfort's 2nd Parliament, 14th December, 1264. *Representatives of towns summoned.*

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[1] See the Writ, Rymer, i. 442. Guizot very justly remarks: Il fallait que les idées sur l'autorité légale des parlements et sur l'illégitimité de la force en matière de gouvernement eussent fait bien des progrès pour que Leicester vainqueur n'osât régler seul le plan d'administration du royaume.—Hist. du Gouv. Représent. ii. 173.

[2] Der Schöpfer des Hauses der Gemeinen.—Pauli, *Simon von Montfort.*

[3] For an examination of the authorities in favour of an alleged (but apocryphal) earlier representation of towns, and especially the complaint of St. Alban's in the 8th Edward II. and the complaint of Barnstaple in the 18th Edw. III., see Hallam, Middle Ages, iii. 28–34, 228.

[4] On the career of De Montfort, the popular hero and martyr-saint, see Blaauw, Barons' War, and Pauli, *Simon von Montfort, Graf von Leicester.* 'A stranger, but a stranger who came to our shores to claim lands and honours which were his lawful heritage, he became our leader against strangers of another mould, against the adventurers who thronged the court of a king who turned his back on his own people. The first noble of England, the

directing them to return not only two knights from each shire, but also two citizens from each city, and two burgesses from each borough.[1]

Progress of the towns.

The towns of England, from a position of semi-servitude, had slowly attained to the possession of liberty, wealth, and the political franchise.[2] Originally the demesne of the King or other lord, spiritual or temporal, they long continued subject to arbitrary talliage and other exactions; their inhabitants differed indeed but little from the villeins of an ordinary manor. Before the Norman Conquest the towns had acquired an individuality distinct from the hundred in which they were locally comprised. Instead of attending at the court leet of the hundred, the townsmen had their own leet, presided over by the elective or nominated reeve, assisted by a body of counsellors, subsequently known as the leet jury. With this primitive organisation, the independent voluntary association of trade guilds ultimately coalesced.[3] As the boroughs

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brother-in-law of the king, he threw in his lot not with princes or nobles, but with the whole people. He was the chosen leader of England in his life, and in death he was worshipped as her martyr.'—Freeman, Growth of Eng. Const. 83.

[1] See the writ in Rymer, i. 449, and Select Chart. 406. The material portions are: Item mandatum est singulis vicecomitibus per Angliam quod venire faciant duos milites de legalioribus, probioribus et discretioribus militibus singulorum comitatum ad regem Londoniis in octavis praedictis in forma supradicta.

Item in forma praedicta scribitur civibus Eboraci, civibus Lincolniae, et ceteris burgis Angliae, quod mittant in forma praedicta duos de discretioribus, legalioribus et probioribus tam civibus quam burgensibus suis.

Item in forma praedicta mandatum est baronibus et probis hominibus Quinque Portuum.

[2] [The silent but persistent growth of towns into the fulness of Communal liberties during the Early Middle Ages, is well illustrated, on the Continent, by the history of Faverney, which grew up under the Abbey of Faverney, during the troubled period 700–1132, when the Nuns had so much to do to see to the safety of their House, that they ultimately deserted it. By 1260, the Benedictine monks who had succeeded the Nuns, found it necessary to make the men of the town of Faverney confess that they were '*tailliabiles abbati et Conventui.*' But the town still grew, with its twelve *prudhommes* and three *échevins*, elected by the townsfolk, side by side with two *échevins* elected by the Nobles and the Church. And in 1428 the town acted as a *Communautey* with liberties and franchises, proved by ancient usages and customs, which the Abbey recognised. See *Nouv. Rev. Hist. de Droit*, 1878, p. 67 *seq.*, Art. *Les Franchises Municipales du Bourg de Faverney*, by Jules Finot.—ED.]

[3] *Supra*, pp. 21–22.

increased in wealth and population, the burghers began to purchase from their lords the *firma burgi*, thus commuting their individual payments for a fixed sum, to be rendered by them in respect of the whole borough, and re-apportioned amongst themselves at their own discretion. The burgesses thus acquired the freehold of their houses and tenements in burgage tenure, which was analogous to that in free socage, being subject only to the suzerainty of the lord, and to a fixed annual rent payable to him. During the lapse of two hundred years after the Conquest, the citizens and burgesses were enabled to extort, from the pecuniary necessities of the Kings, charters of liberties varying greatly in extent, but all conceding more or less of self-government through the medium of elected and representative magistrates.[1]

Representative machinery first employed for Judicial and Fiscal purposes.

As in the case of the counties, so in that of the boroughs, the representative machinery was first employed for judicial and financial purposes before its extension to the domain of politics.[2] In the court of the shire—the ancient Folk-Moot, or assembly of the people—all the national elements had from time immemorial been wont to meet together, the bishops and other dignified clergy, earls, barons, knights, and freeholders in person;[3] the townships each by their representative reeve and four men. As the boroughs gradually grew into incorporate municipalities, they also sent their representatives to the assembly of

Representation of the boroughs in the Shire Courts.

[1] The progressive liberties granted to the towns should be studied in the charters of Henry I., Henry II., Richard I., and John, collected in Stubbs, Select Chart. 102–108, 157–160, 256–259, 299–306; and on the difficult and obscure subject of the various constitutions of the cities and boroughs, see his Const. Hist. ii. 216, 232; and Hallam, Midd. Ages, iii. 220.

[2] [On taxation generally, see Dowell, *History of Taxation and Taxes in England*, 1884. The mediæval period is comprised in vol. i. bks. i.–vi.—ED.]

[3] [The personal attendance of the Freeholders generally in the County Court, after the Conquest, is now being denied by some writers, *e.g.*, Mr. F. W. Maitland, and Mr. J. H. Round, in Arts. in *Eng. Hist. Rev.*, and *Arch. Rev.*, 1888–9, but it does not appear that any Legislative restriction of this right or duty of the Freeholder is adduced in favour of the new theory that, when present, it was in virtue of some special duty, and not as Freeholder. Until evidence of a Legislative restriction of the right is adduced, it would seem to the present Editor safer to adhere to the old view of the continuity of the Freeholder's presence.—ED.]

the shire. This is apparent from a very important writ, issued by Henry III. in 1231 to the Sheriff of Yorkshire, for assembling the county court before the Justices itinerant, in which he is directed to summon for that purpose not only the persons already enumerated, but also twelve lawful burgesses as representatives from every borough.[1]

First symptom of representation of towns in the National Assembly, 1213.

The year 1213, in which the first instance of county representation occurred, is also the date of the first symptom—it can scarcely be termed anything more—of the representation of towns in the Central Assembly. To the Council (the importance of which has already been pointed out[2]) summoned by King John to meet at St. Alban's in 1213, and at which the prelates and 'magnates of the realm' are stated to have been present, the sheriffs of every county were directed to return from every township in the King's demesne four men and the reeve, to estimate the damages lately suffered by the Bishops.[3] This was evidently an adaptation for a particular purpose, by the central government, of the local system of representation long familiar in the constitution of the court of the shire. It is probable that from an early period some of the wealthy burghers of important towns occasionally attended

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[1] The words of the writ are: omnes archiepiscopos, episcopos, abbates, priores, comites, barones, milites, et omnes libere tenentes, de tota ballia tua, et de qualibet villa, quatuor legales homines et praepositum, et de quolibet burgo duodecim legales burgenses.—Shirley, Royal Letters, i. 325. Bishop Stubbs, commenting on this writ, points out that the County court contained all the elements that were united in the *commune concilium regni* at the time, and in addition the representatives of the townships and boroughs. 'We begin,' he remarks, 'to see more clearly the process by which the national council becomes the representative parliament. It will, when it is completed, be the concentration of all the constituents of the shiremoots in a central assembly; the permanence of the ancient popular elements, and the assimilation to them of the new municipal ones, makes a perfect parliament possible.' —Select Chart. 349.

[2] *Supra*, pp. 114, 241.

[3] *S.a.* 1213. Misit rex litteras ad omnes vicecomites regni Angliae, praecipiens ut de singulis dominicorum suorum villis quatuor legales homines cum praeposito, apud Sanctum Albanum pridie nonas Augusti facerent convenire, ut per illos et alios ministros suos de damnis singulorum episcoporum et ablatis certitudinem inquireret, et quid singulis deberetur. . . . Interfuerunt concilio apud Sanctum Albanum Galfridus Filius Petri et episcopus Wintoniensis cum archiepiscopo, et episcopis et magnatibus regni.—Matt. Paris, 239.

the general assembly. The letter addressed to the Pope by the Parliament of 1246 is written in the name, not only of *totius regni Angliae barones, proceres, et magnates,* but also of *nobiles portuum maris habitatores, necnon et clerus et populus universus.*[1] We are not, however, justified in attributing any representative character to these barons of the Cinque Ports, or to the other burghers whose presence in Parliament is sometimes recorded or implied prior to the year 1265. The only object for summoning representatives of the towns was to secure their consent to taxation, and hitherto the kings had found it more convenient to treat separately, through the officers of the Exchequer, with each town in the Royal demesne.

Transitionary period in constitution of Parliament, 1265–1295.

The innovation of Simon de Montfort in calling to the central assembly elected representatives of the boroughs, completed the formation of the National Parliament on substantially the same basis which it has ever since retained. But its existence during the next thirty years was still precarious. From 1265 to 1295 was a transitionary period; and it is only from the latter year that we can date the regular and complete establishment of a perfect representation of the Three Estates in Parliament. There is no proof that representatives of either counties or boroughs attended the Parliaments of the latter years of Henry III.'s reign. The statement, however, in the preamble to the Statute of Marlborough (52 Hen. III.) that the King had called together the more discreet men of the realm *tam ex majoribus quam minoribus* affords a strong presumption that the knights of the shire attended the Parliament of 1267.[2] A contemporary chronicler, moreover, records the summoning in 1269 of representatives from the cities and boroughs, to assist at the translation of the body of Edward the Confessor to Westminster Abbey, and that on the conclusion of the ceremony a Parliament was held,

[*Perfect representation,* 1295.]

Parliament during latter years of Henry III.

[1] Matt. Paris, 700. [Cf. *Arch. Rev.*, Jan. 1890, Prof. Burrows on the *Cinque Ports.*—Ed.]

[2] Statutes of the Realm, p. 19; and see Stubbs, Const. Hist. ii. 222.

at which a subsidy on the moveables of all laymen was granted to the King. But it is not certain that the representatives of boroughs remained for the Parliament; indeed, the language of the chronicler would rather seem to imply that they did not.[1] The fact, however, that they were summoned on this occasion, together with the prelates and magnates of the kingdom, is evidence of the greatly increased importance with which the Civic element in the nation was now regarded.

Parliaments under Edward I.

Under Edward I. instances of representation are few, while Great Councils, attended only by the prelates and magnates, are very frequent. With all his good and great qualities, Edward loved the exercise of despotic power, and was evidently loth to admit the Commons to a share in the government. At this period there appears to have been no legal or definite distinction between complete Parliaments and Great Councils of the realm. Several of the most important statutes of Edward's reign were passed in assemblies at which no representatives of the Commons attended. But even during the first twenty years of his reign, before the force of circumstances had compelled him to yield to popular demands, Parliaments, containing representatives from either counties or boroughs, or from both, were occasionally summoned for extraordinary purposes.

1273.

At the national assembly, summoned after the death of Henry III. to meet at Westminster on the 14th of January, 1273, to swear allegiance to Edward I., who was still in Palestine, there attended not only the prelates and barons, but four knights from each county, and four citizens from every city.[2]

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[1] *S.a.* 1269. Convocatis universis Angliae prælatis et magnatibus, nec non cunctarum regni sui civitatum pariter et burgorum potentioribus . . . venerandas illas reliquias (sc. Sancti Edwardi) de veteri scrinio transferens. . . . . Celebrato tandem tantæ translationis solemnio, coeperunt *nobiles*, ut assolent, parliamentationis genere de regis et regni negotiis pertractare.—Chron. T. Wykes [Ann. Mon. iv.], 226[-7].

[2] *S.a.* 1273. Facta convocatione omnium prælatorum et aliorum magnatum regni apud Westmonasterium, post mortem illustris regis Henrici, con-

On his return to England, Edward summoned his first general Parliament at Westminster in April, 1275. In the preambles of the important statutes therein enacted (the statute of Westminster I. and the statute granting to the King the custom on wool, woolfells, and leather), they are said to be made 'by his council and by the assent of the archbishops, bishops, abbots, priors, earls, barons, *and the commonalty of the land thither summoned*,' and the custom is specially said to be granted by the *communitates regni ad instantiam et rogatum mercatorum*, as well as by the prelates and barons.[1]

1275. *First Parliament of Edward I.*

In 1283, while the King, the barons, and the military force of the kingdom were at Rhuddlan, intent upon the conquest of Wales, two extraordinary assemblies were summoned, the one at Northampton, the other at York, to raise additional forces and grant subsidies. Writs were issued on the 24th November to the sheriffs, ordering them to send to Northampton or York, as the case might be, on the 20th of January, 1283, (1) all freeholders, not already with the army, capable of bearing arms, and holding lands of more than 20*l.* annual value; (2) four knights from each county having full power for the community of the same county; and (3) two men from each city, borough, and market town, having like power for the community of the same, *ad audiendum et faciendum ea quae sibi ex parte nostra faciemus ostendi.*[2] The Parliamentary proceedings of this year are important, as 'marking the point of final transition from the system of local to that of central assent to taxation.'[3] The King had already, in order to raise

20th Jan. 1283. Extraordinary assemblies, Northampton and York.

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venerunt archiepiscopi et episcopi, comites et barones, abbates et priores, et de quolibet comitatu quatuor milites et de qualibet civitate quatuor, qui omnes. . . . [sacramentum eidem domino Edwardo tanquam terræ principi praestiterunt].—Ann. Winton. 113. [Ann. Waverl. 379.]

[1] Stat. Westminster I., Statutes of the Realm, i. 26; Palgrave's Parliamentary Writs, i. 2. The presence of representatives of the commons in Parliament may also be inferred from the preamble of the statute of Marlebridge (51 Hen. III.), *convocatis discretioribus tam majoribus quam minoribus*, repeated in French in the statute of Gloucester (6 Edw. I.), *appelez les plus descrez de sun regne, ausi bien greindres, cum des meindres.* [Rev. Stat. i. 29.—Ed.]

[2] Palgrave's Parliamentary Writs, i. 10.

[3] Stubbs, Select Chart. 449.

funds for the Welsh war, successfully negotiated for a subsidy with the counties and boroughs separately.[1] But the sums raised not proving sufficient, the necessity for a general grant became apparent, and led to the general assemblies of representatives of the counties and boroughs above described. Convocations of the Bishops, abbots, priors, and other heads of religious houses, with the proctors of the cathedral clergy of the provinces of Canterbury and York were also summoned, through their respective Archbishops, to meet at Northampton and York on the same day as the Estate of the Commons, for the purpose of making a grant to the King.[2] On the ground that the parochial clergy were unrepresented, the Convocation of Canterbury refused to contribute anything; and it was not until after a long delay, during which the diocesan synods were separately consulted, that a 'twentieth' (half the sum originally demanded by the King) was at length granted in another Convocation, held in November, and attended by two proctors from the parochial clergy of each diocese.[3]

1283, 30th September, Parliament of Shrewsbury or Acton Burnell.

In June of the same year, Edward, being at Rhuddlan, summoned a national Council to meet at Shrewsbury on the 30th of September, for the purpose of passing judgment of treason on David, brother and successor of Llewelyn, Prince of Wales, who had surrendered as prisoner after the conquest of that country.

Besides the earls and barons who were individually summoned, writs were issued (1) to the sheriffs throughout England, directing the attendance at Shrewsbury of two elected knights from each county, and (2) to the magistrates of London and twenty other towns, directing the return from each of two elected representatives *nobiscum super hoc* [*sc. quid de David fieri debeat*] *et aliis locuturi.*[4]

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[1] See Palgrave's Parliamentary Writs, i. 384, 387.

[2] Parl. Writs, i. 10.

[3] Stubbs, Select Chart. 452. The Convocation of York seem to have been more compliant, but their promised contribution was still unpaid three years afterwards. *Id.* Const. Hist. ii. 115.

[4] Parliamentary Writs, i. 16.

This assembly is called by contemporaries the Parliament of Shrewsbury or Acton Burnell. Exception has been taken to the use of the word 'parliament' in this instance, on the double ground that there is no proof that any of the clergy were present,[1] and that the representatives of the twenty-one towns were summoned by separate writs, instead of through the sheriffs in the usual way. But however imperfect the composition of this Parliament may have been, we have here an unequivocal instance of the representation of both sections of the Commons in the central assembly of the nation. The Commons would appear to have left David of Wales to be tried by his peers at Shrewsbury, while they themselves adjourned to Acton Burnell, to discuss the 'other matters' referred to in the writ. The 'Statute of Acton Burnell,' or *De Mercatoribus*,[2] though in form an ordinance of the King and his Council only, was the outcome of the deliberations of this assembly of the Commons.

The next instance is one of County representation only. 1290.
On the 14th of June, 1290 (18th Edward I.), writs were issued to the sheriffs to send from each shire, to a Parliament at Westminster on the 15th of July, two or three elected knights, *ad consulendum et consentiendum pro se et tota communitate comitatus, hiis quae comites, barones, et proceres tunc duxerint concordanda.*[3] The transitory state of Parliament is peculiarly illustrated by the proceedings of this year. The King had already held a Parliament on St. Hilary's Day (Jan. 13), to which the magnates and *proceres* only were summoned. In a second session of this Parliament, on the morrow of Holy Trinity (29th of May) the prelates, earls, barons, and *proceres* granted for the marriage of the King's eldest daughter (*ad filiam*

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[1] The fact that the principal object of the assembly was a trial for a capital offence sufficiently accounts for their non-summons. [But cf. Sel. Chart. 453.—Ed.]

[2] 11 Edw. I., confirmed by 13 Edw. I. c. 3.

[3] Report on the Dignity of a Peer, App. i. 54; Palgrave's Parl. Writs, i. 21.

suam primogenitam maritandam),[1] (1) that he should take an aid of the same kind and amount as his father King Henry had taken from the kingdom for the marriage of his daughter to the King of Scots, and (2) after reciting that King Henry had only received from each knight's fee two marks (1 mark = 13*s.* 4*d.*) they further granted that the King, for this turn, should take forty shillings on every knight's fee; but on condition that the present grant should not form a precedent to their prejudice, and that the aid should be levied in the same manner as that granted to King Henry.[2] It is remarkable that the aid was further declared by the magnates to be granted *pro se et communitate totius regni quantum in ipsis est*,[3] words which seem to express a doubt of their competency to make a grant, even on the knight's fee, for the whole community, without

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[1] Rot. Parl. i. 25. The words of the Roll are distinctly *filiam primogenitam*, and indeed it is difficult to understand, having regard to the well-known feudal incidents, how the aid *pur fille marier* could be asked for any other than the eldest daughter. The fact, however, that Edward's second daughter Joan of Acre had been married shortly before, on the 30th of April, to the Earl of Gloucester (Cont. Flor. Wigorn. ii. 242) seems to have led Bishop Stubbs to infer in his Const. Hist. (ii. 121) that the aid was demanded not indeed for, but on the occasion of, Joan's marriage, which was made use of by the King as a pretext for 'raising money on the old customary plea.' The genealogical accounts of Edward's children by his two wives are by no means free from ambiguity; but Rapin (Hist. Eng. i. 303), Anderson (Royal Genealogies, Table 491), Betham (Geneal. Tables, tab. 506), Bouillet (Atlas d'Histoire, 1865, p. 511), the 'Annals of England' (Lib. ed. p. 166), and Burke (Peerage) [1890] concur in making Eleanor the eldest daughter of the first marriage. Mr. Hereford B. George (Geneal. Tables, 1874, tab. 3) omits all mention of Eleanor and makes Joan [born 1272, *Cont. Flor. Wig.* ii. 210] the eldest daughter. Bishop Stubbs agrees genealogically with the majority of these authorities that Joan 'was not the King's eldest daughter.' According to Anderson (tab. 491) the eldest daughter Eleanor was born in 1268 [Bouillet, *Atlas*, *u. s.*, says 1266, the *Annals of England* 1264]; married, 1st by proxy, to Alphonso, King of Aragon, who died before consummation, and 2ndly, in 1294 [*Cont. Flor. Wig.* gives the date as 20th Sept. 1293], to Henry, Count of Bar; and she died 1298. In another table (p. 706) Anderson states that Alphonso III., 'Munificus,' succeeded as King of Aragon in 1285, and died in 1291. The marriage (by proxy) between Eleanor and Alphonso must have been contracted before the demand of the aid *pur fille marier*, in May, 1290; and it would seem therefore that the aid for her marriage was demanded in the ordinary course, and that Joan's marriage to Gilbert de Clare, Earl of Gloucester, on the 30th of April, as well as the marriage of her other sister Margaret, to John, Duke of Brabant and Limburg on the 10th of July (Cont. Flor. Wig. ii. 243) [9th, *Ann. Dunst.* 359] were only accidentally coincident. [See note, *post*, p. 272, for latest documentary evidence.—ED.]

[2] Rot. Parl. i. 25; Palgrave's Parl. Writs, i. 20.

[3] Rot. Parl. *loc. cit.*

the presence of the Commons, or at least of the minor tenants-in-chief. The aid *pur fille marier* was one of the three ancient feudal imposts excepted from the twelfth section of King John's Magna Charta,[1] and, even if that section had not been omitted from every subsequent re-issue of the Charter, would not appear, in strict law, to have required a Parliamentary authorisation. But the *amount* of the aid in the case of tenants *in capite* was not yet fixed by law,[2] and hence the necessity for an agreement with them on this point. The hesitation of the magnates to bind the minor tenants-in-chief without their authority, seems to mark the deepening sense of the injustice of taxation without consent which seven years later was to culminate in the general restraint on arbitrary exactions embodied in the *Confirmatio Chartarum.* It was probably in consequence of the doubts entertained by the magnates as to their authority, and also not without a view to a further grant, that the representatives of the shires were summoned on the 15th of July to give their consent. In the meantime, on the 8th of July, before the Commons had arrived, the King, at the instance of the magnates alone (*ad instantiam magnatum regni sui*) enacted the celebrated Statute of Westminster the Third or *Quia Emptores*, by which a stop was put to the practice of subinfeudation.[3] As both the aid *pur fille marier* and the Statute *Quia Emptores* affected the landowners only, the consent of the citizens and burgesses would not be considered necessary. But that the right to share in general legislation of even that section of the Commons which was closely allied to the baronage was not at this time established, is evident from the publication by the King of a statute affecting all landowners with the counsel and consent of the baronage alone,

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[1] *Supra*, p. 134.

[2] The aids payable by the tenants of mesne lords, for making the eldest son a knight or marrying the eldest daughter, had been fixed by the stat. of West. I. 3 Edw. I. c. 36, at 20*s.* on the knight's fee. It was not until the 25 Edw. III. c. 11, that the same was done for the tenants *in capite.*

[3] *Supra*, pp. 67, 150, n. 1.

and without the assent of the representatives of the shires. With regard to taxation, however, the latter appear to have effectively vindicated their rights. The aid granted by the baronage was laid aside for a time, (it was not exacted till twelve years later, in 1302),[1] and in lieu thereof the King appears to have accepted a 'fifteenth' from the laity and a 'tenth' from the clergy.[2]

1294. Four years later, on the 8th of October, 1294, the King being in want of money, both for the suppression of the Welsh rebellion and for his projected expedition against Philip the Fair for the recovery of Gascony, again summoned to a Parliament which was to meet at Westminster on the 12th of November, two elected knights from each shire *ad consulendum et consentiendum pro se et communitate illa hiis quae comites, barones, et proceres praedicti concorditer ordinaverint in praemissis.* On the following day fresh writs were issued summoning two other knights from each county to attend in addition to those previously called *ad audiendum et faciendum quod eis tunc ibidem plenius injungemus.*[3] The barons and knights granted a 'tenth;' and a 'sixth,' probably by way of talliage, was exacted from the towns without asking their consent.[4]

1295. End of transitionary period. The following year, 1295 (23rd Edward I.), is an important epoch in Parliamentary history. It marks the close

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In the order for its collection, dated 7th Nov., 30 Edw. I., the King declares 'cujus quidem auxilii levacioni faciende, pro dicte communitatis aisiamento, hucusque supersedimus graciose.' Rot. Parl. i. 266. [Pat. 30 Edw. I. n. 1.—ED.]

[2] Annal. Dunstapl. p. 362. The documents and other authorities for the constitution of Parliament during the transitionary period, 1265–1295, with the valuable comments of Bishop Stubbs thereon, should be carefully studied in Select Chart. pp. 420–429, 438–441, 449–455, 457, 464–476.

[3] Report on Dignity of a Peer, App. i. 60.

[4] Matt. Westm. 422. [Dowell, *Hist. of Taxation*, i. p. 64, citing Records, 23 Edw. I., Roll 73, says, 'Tallage was again used in 1294, when a grant was obtained by separate negotiation with the cities and boroughs, on an occasion when no representatives of their interests had been summoned to Parliament, and the barons and knights had granted, on their part, a tenth of all their moveables. London made the liberal grant of a sixth of moveables, and the sixth was levied in ten other towns by royal commissioners appointed for the purpose of 'asking, requiring and effectually inducing personally the tenants of demesne' to make the grant 'by all ways that they should see expedient.'—ED.]

Perfect representation of the Three Estates of the Realm.

of the transitionary period, and the regular and complete establishment of a perfect representation of the Three Estates of the Realm in a really national Parliament.[1] Edward's difficulties had become serious. The expedition to France was still delayed by the rebellion of the Welsh, and before their obstinate resistance could be subdued, war with Scotland supervened. The French had not only overrun Gascony, but had sent a fleet to the English coast, which effected a landing at Dover and burnt a convent and several houses on the 1st of August—the very day on which a Great Council had been summoned to meet at Westminster[2] to consider, among other things, the proposals of two Legates sent by the Pope to endeavour to bring about peace between France and England.[3] The Legates were ultimately empowered to conclude a truce;[4] but the position of the kingdom was still critical, and Edward seems to have felt that he required to be backed up by the whole nation, supporting him as well by their

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[1] 'The materials of a parliamentary constitution were ready to his (Edward's) hand, yet it cannot be denied that it is to him we owe its regular and practical establishment. Without a single afterthought, or reservation of any kind, he at once accepted the limitation of his own powers. To the Parliament thus formed he submitted his legislative enactments. He requested their advice on the most important administrative measures, and even yielded to them, though not without some reluctance, the last remnant of his powers of arbitrary taxation. He had his reward. Great as were his achievements in peace and war, the Parliament of England was the noblest monument ever reared by mortal man. . . . He found it a council occasionally meeting to grant supplies to the king, and to urge upon him in return the obligation of observing the charter to which he had sworn: he left it a body representing the nation from which it sprang, and claiming to take part in the settlement of all questions in which the nation was concerned. Many things have changed, but in all main points the Parliament of England, as it exists at this day, is the same as that which gathered round the great Plantagenet. It is especially the same, in that which forms its chief glory, that it is the representative not of one class, or of one portion of society alone, but of every class and every portion, which at any given time, is capable of representation. . . . Edward was a far more powerful sovereign than his father, not so much by the immeasurable superiority of his genius, as because he placed the basis of his authority on a broader footing, and carried on the work of consolidating the English nation in the only way in which such a work can, in the end, be successfully accomplished, by making its progress go hand-in-hand with liberty.'—S. R. Gardiner, Hist. Eng. i. 21.

[2] Rymer, i. 822.

[3] Flor. Wigorn. (Contin.) ii. 276.

[4] Rymer, i. 825.

common counsel and approval as by a general and adequate grant of an aid. He accordingly, on the 30th of September, summoned a Parliament to meet at Westminster in the November following, so constituted as to represent, and have the power to tax, the whole nation. The summons to the bishops enters with unusual detail into the causes which had rendered it necessary to call Parliament together, and is prefaced by a citation from the Code—*quod omnes . . tangit ab omnibus comprobetur*[1]—which happily expresses at once the theory of the earlier Anglo-Saxon Constitution, and, as interpreted by the system of representation, both the theory and the practice of the English Constitution from the days of the 'greatest of the Plantagenets' to our own.[2] In its beneficent influence upon the development of Constitutionalism this maxim of Roman law may be regarded as an antidote to its more famous fellow-maxim, *quod principi placuit legis habet*

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[1] *Cod.* V., lix., 5. It occurs also in the Canon Law, but in a part (*Sexta pars Decretal. de Regulis juris*, c. 30) unpublished in 1295. But it seems to have been familiarly known in England; cf. Matt. Paris (anno 1251), p. 815: 'quod enim omnes angit et tangit ab omnibus debet trutinari;' and the Vita Edwardi II. (ed. Hearne), p. 111. Stubbs, Const. Hist. ii. 128.

[2] The whole preamble of the writs to the archbishops and bishops is remarkable. 'Sicut lex justissima, provida circumspectione sacrorum principum stabilitata, hortatur et statuit ut *quod omnes tangit ab omnibus approbetur*, sic et nimis evidenter ut communibus periculis per remedia provisa communiter obvietur. Sane satis noscis et jam est, ut credimus, per universa mundi climata divulgatum, qualiter rex Franciae de terra nostra Vasconiae nos fraudulenter et cautelose decepit, eam nobis nequiter detinendo. Nunc vero praedictis fraude et nequitia non contentus, ad expugnationem regni nostri classe maxima et bellatorum copiosa multitudine congregatis, cum quibus regnum nostrum et regni ejusdem incolas hostiliter jam invasit, linguam Anglicam, si conceptae iniquitatis proposito detestabili potestas correspondeat, quod Deus avertat, omnino de terra delere proponat. Quia igitur praevisa jacula minus laedunt, et res vestra maxime, sicut ceterorum regni ejusdem concivium, agitur in hac parte, vobis mandamus,' &c. The preamble of the writs to the lay baronage is more concise: 'Quia super remediis contra pericula quae toti regno nostro hiis diebus imminent providendum vobiscum et cum ceteris regni nostri proceribus habere volumus colloquium et tractatum.' The writs to the sheriffs are very similar: 'Quia cum comitibus, baronibus et ceteris proceribus regni nostri, super remediis contra pericula quae eidem regno hiis diebus imminent providendum, colloquium habere volumus et tractatum.' The elected knights, citizens, and burgesses are directed to attend 'plenam et sufficientem potestatem pro se et communitate comitatus, civitatum et burgorum praedictorum divisim ab ipsis tunc ibidem habentes . . . ita quod pro defectu hujusmodi potestatis negotium praedictum infectum non remaneat quoquo modo.'—Rep. on Dignity of a Peer, App. i. 66, 67.

vigorem, which, in the mouths of the mediæval jurists, did so much to build up the despotic power of the kingly office.[1] Besides the ordinary summons to the lay and spiritual baronage, writs were issued to the sheriffs ordering the election and return of two knights from each county, two citizens from each city, and two burgesses from each borough, *ad faciendum quod tunc de communi consilio ordinabitur in praemissis.* But together with the knights and burgesses, the whole inferior clergy, by their representatives under the *praemunientes* clause, were now for the first time united with the assembled baronage in the national Parliament. In the writs addressed to the Archbishops of Canterbury and York, each was directed not only to be present at the Parliament, but also *premonished* to cause the prior [Dean] of his cathedral and the archdeacons of his diocese to attend in person, and the chapter of the cathedral and the parochial clergy by their representative proctors.[2] This great assembly, the most general which had ever yet been held, did not form a single body. The aid was discussed and voted by each of the three bodies separately. Each made a different proportional grant. The Barons and Knights gave the King one-eleventh of their moveables; the Burgesses one-seventh; the Clergy only one-tenth.

Inferior clergy represented in Parliament under the *praemunientes* clause.

The summons to Parliament of representatives of the inferior clergy was due, like that of the citizens and burgesses, to the pecuniary necessities of the King, controlled by the principle expressed in the maxim, 'what touches all should be approved by all,' that taxation could only be legally imposed with the consent of the taxed. It was

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[1] [The limitation of this maxim supplied by Gaius in the words following, *quia ipse per legem imperium accessit*, seems to be generally overlooked.—ED.]

[2] Report on Dignity of a Peer, App. i. 66, 67. There were summoned to this Parliament, eight Earls, forty-one Barons, the two Archbishops and the Bishops, sixty-seven Abbots, the Masters of the Temple and of Sempringham and the Prior of the Hospital of St. John of Jerusalem, the prior [Dean] and archdeacons of the dioceses of Canterbury and of York, one proctor from the chapter of each cathedral, and two proctors from the parochial clergy of each diocese, two knights from each county, and two citizens or burgesses from each city or borough in every shire.

doubtless the intention of Edward's legal and systematic mind to make the representatives of the clergy an effective branch of a comprehensive national Parliament. But this design was defeated by the action of the clergy themselves. Averse, by the nature of their calling, from interfering in the ordinary subjects of secular legislation, despising as barbarous the system of Common Law, and desirous of keeping themselves as a privileged class apart from the body of the people, they unwillingly obeyed a summons the primary object of which they well knew was to get from them as much money as possible. The clergy, moreover, had long possessed their own peculiar assembly or Convocation which, earlier in the reign of Edward I., had already been remodelled upon the representative basis.[1] In this assembly, sitting in two Provincial divisions, at London and York, they preferred to grant their aids; and, although regularly summoned to Parliament, under the *praemunientes* clause, their attendance was always reluctant and intermittent, and in the Fourteenth century ceased altogether. But whether in Convocation or in Parliament, 'they certainly formed a legislative council in ecclesiastical matters, by the advice and consent of which alone, without that of the Commons (I can say nothing as to the Lords), Edward III., and even Richard II., enacted laws to bind the laity.'[2] For two hundred years after they had ceased to attend Parliament, the clergy retained the strictly Parliamentary function of taxing themselves in Convocation. But from the reign of Henry VIII., when the Reformed Church, which in its National aspect was itself the creation of Parliament, was placed in strict subordination to the State,[3]

The clergy averse from interfering in secular legislation.

Convocation.

The clergy cease to attend Parliament in the 14th century: [in Scotland only in 17th cent.—ED.]

But preserve the power of self-taxation till 1664.

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[1] See the series of summonses to Convocation, 1225–1227, in Stubbs, Select Chart. 442, and the Introductory Sketch, p. 38.

[2] Hallam, Midd. Ages, iii. 137. The celebrated statute *De Haeretico Comburendo*, 2 Hen. IV. c. 15, 1401, was enacted on the petition of the clergy alone, and is expressed as being made by the consent of the Lords but without mention of the Commons.

[3] By 25 Hen. VIII., c. 19, Convocation was forbidden to [enact constitutions or Canons] without the King's licence.—See [Rev. Statutes, i. 416]. [On Convocation generally, see Joyce, *England's Sacred Synods*; Burrows, *Parliament and the Ch. of Eng.*; Dixon, *Hist. of Church of England*; and

the subsidies granted in Convocation were henceforward always confirmed by Act of Parliament. At length, in 1664, the practice of ecclesiastical taxation was discontinued, without the enactment of any special law, and the clergy, being henceforth taxed at the same rate and in the same manner with the laity, assumed and have ever since enjoyed the right of voting in respect of their ecclesiastical freeholds, in the election of members of the House of Commons.[1]

The clergy not now a separate estate of the realm.

Thus, whilst theoretically the political constituents of the nation are the King, and the three estates of the realm, the Lords, the Clergy, and the Commons, practically there are and have been for centuries but two estates, the Lords and Commons. The clergy are now a separate estate only by a political and legal fiction. In fact they are amalgamated with the two continuing estates, and are represented in the Lords by the Bishops, in the Commons by the members of that House, who are elected by all qualified persons, whether clerical or lay, below the rank of peerage.

Government by King, Lords and Commons established under Edward I.

Ever since the year 1295 (23rd Edward I.) Parliaments after the model of Simon de Montfort's famous assembly have been regularly summoned in continuous, or all but continuous, succession. The essential basis of the English Constitution, government by King, Lords, and Commons, may thus be said to have been definitely fixed in the reign of the great Edward.[2] To the same period we must also

And the right of arbitrary taxation surrendered.

on the Reformation Settlement, Dibdin's Brewer's *Reformation Settlement.* —Ed.]

[1] The taxation of the clergy out of Convocation was termed [by Bp. Gibson] 'the greatest alteration in the constitution ever made without an express law.' It was settled by a mere verbal agreement between Archbishop Sheldon and the Lord Chancellor Clarendon.—See Hallam, Const. Hist. iii. 240, 241.

[2] 'It was by Edward I. that the bases were settled upon which the English constitution rests. With marvellous sagacity he comprehended the purport of every true thought which was floating on the surface of the age in which he lived. Perhaps no man, excepting Cromwell, possessed of equal capacity for government, ever showed less inclination to exercise arbitrary rule. He knew how to mould his subjects to his own wise will, not by crushing them into unwilling obedience, but by inspiring them with noble thoughts. When he first reached man's estate he found his countrymen ready to rush headlong

assign the full and complete acknowledgment of the most important—because the practical mainspring of every other—power of Parliament. It was long before the King would surrender the right of taking talliages without a parliamentary grant.[1] In order to carry on his extensive wars he was in constant need of large sums of money, which he raised by arbitrary exactions from all classes of his subjects, lay and clerical. In vain did the clergy endeavour to shelter themselves under the Bull of Boniface VIII., *Clericis laicos* (24th of February, 1296), which absolutely forbade, under pain of excommunication, the payment to laymen of any tax whatever on the revenues of the Church. The practical outlawry of the whole clerical body (30th January, 1297), and the temporary confiscation of the estates of the see of Canterbury (12th February, 1297), compelled the clergy to abandon their untenable position,[2] [and to yield *per se*, or *per mediatores*.]

Events leading to the *Confirmatio Chartarum.*

Exactions from the clergy.

Bull *Clericis Laicos*, 1296.

Whilst the clergy were exasperated by these violent proceedings, the merchants were equally aggrieved by the heavy impositions placed on the export of their wool, and by the actual seizure of the greater part of it, for which payment was nominally given by tallies upon the Exchequer. Large quantities of provisions were, in the same manner, exacted from the men of each county for the King's expedition to Flanders, and, in the words of the old chronicler, *multae fiebant oppressiones in populo terrae*.[3] The baronage also were irritated by the King's open disregard of many of the provisions of the Great Charter and the Charter of the Forest, both of which he persistently refused to confirm. They had, moreover, a

Exactions from the merchants, by seizure of their wool and the 'maltolte.'

Infractions of Magna Charta.

Foreign service.

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into civil war. When he died, he left England free as ever, but welded together into a compact and harmonious body. There was work enough left for future generations to do, but their work would consist merely in filling in the details of the outline which had been drawn once for all by a steady hand.'—Gardiner, Hist. Eng. i. 16.

[1] [Dowell, *Hist. of Taxation*, i. 66, gives 1332 as the date of the last attempt at a tallage.—ED.]

[2] Ann. Trivet. p. 353, *s. a.* 1297.

[3] Walt. de Hemingburgh, ii. 120, *s. a.* 1297.

personal grievance in the King's demand of foreign service, which they alleged that neither they nor their ancestors had ever been liable to perform.[1] On the 24th of February 1297. Edward held what was styled a 'Parliament,' but to which only the lay baronage, without any clergy or representatives of the Commons, was summoned. He here proposed that the barons should go to Gascony, while he himself proceeded to Flanders. On their refusal,[2] he threatened to take away their lands and give them to those who would go. This led to a personal altercation with Roger Bigod, Earl of Norfolk, the Marshal of England,[3] which ended in the breaking up of the assembly and the withdrawal of the Marshal, and of Bohun, Earl of Hereford, the Constable, who, supported by a large number of the magnates and a force of 1500 cavalry, stopped the King's officials from seizing the wool, hides, and other commodities on their estates, and resolutely prepared for armed resistance.[4]

The Earls of Hereford and Norfolk.

On the 15th of May, Edward issued writs to the bishops, barons, and sheriffs for a general military levy of all the landholders of the kingdom whose lands were of £20 annual value and upwards, whether tenants in chief or holding of mesne lords. They were to assemble in London on the 7th of July, with horses and arms, ready to cross the sea under the King's personal command.[5] On the 7th the

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[1] W. Rishanger, Chron. 175, *s. a.* 1297. [*Petitiones Communitatis.*]

[2] Cf. the refusal of foreign service by St. Hugh of Lincoln in 1198 (*supra*, p. 103), and by the barons of King John (*supra*, p. 111).

[3] The altercation is graphically described by Walter de Hemingburgh (ii. 121): 'Comes etiam Herefordensis et comes marescallus excusaverunt se, dicentes quod officia sua quae sibi jure haereditario competebant facerent libenter, eundo cum ipso rege. Iterataque prece rogatus est comes marescallus ut iret. Et ait, "Libenter tecum vadam, O rex, praecedendo faciem tuam in acie prima, sicut mihi competit haereditario jure." Et rex, "Et etiam sine me ibis cum aliis." At ille, "Non teneor, nec est meae voluntatis, O rex, sine te iter arripere." Et iratus rex prorupit in haec verba, ut dicitur, "Per Deum, comes, aut ibis aut pendebis." Et ille, "Per idem juramentum, O rex, nec ibo nec pendebo."' [This '*Parliamentum*' was held at Salisbury.—Ed.]

[4] Walt. de Hemingburgh, ii. 121–2.

[5] Palgrave's Parl. Writs, i. 281. A preliminary writ to the sheriffs to summon the landholders, but without specifying the intended voyage beyond sea, was issued on the 5th of May. Edward again applies the maxim 'quod omnes tangit' —'perpendentes quod istud negocium est tam grande et ita communitates omnes

force met; the Constable and Marshal, when called upon by the King, refused to perform the duties of their offices, in taking the lists of the army, and at their own request were superseded. The summons of the whole force of the kingdom for the purpose of an aggressive foreign war was such a violent straining of the military obligations, alike of feudal tenants and national militia, that the two Earls might well have based their refusal on the broad ground of the unconstitutionality, if not of the illegality, of the King's proceedings. They chose, however, to base their refusal on what looks very like a bit of special pleading as to the wording of the summons. Edward, distrustful apparently of the legality of his position, had employed the words *affectuose requirimus et rogamus*, instead of the usual imperative formula, in his summons to the earls and barons, and the Constable and Marshal professed to have regarded this as a mere informal invitation, and not a legal summons.[1] Their answer had probably been deliberately determined upon as most appropriate in the circumstances; for we know from Matthew of Westminster that the Earls and Barons had been concerting their measures in what he terms a Parliament of their own (*parliamentum suum*) in the forest of Wyre in the Welsh march. In dealing with a man of Edward's well-known legal affinities, they might have thought it prudent in the coming contest to cover themselves with the shield of technical legality, while at the same time accentuating the fact, which might otherwise have been overlooked, that the King had not ventured to command what they alleged, and he himself ultimately admitted, to be an illegal requisition.[2] Hallam's eulogium upon these two leaders

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et singulos de dicto regno nostro tangit, quod in hoc nemini deferri potest.' In the writs of the 15th the sheriffs are ordered to summon [the] archbishops, bishops, abbots, priors, and other ecclesiastical persons, 'et etiam viduas et alias mulieres qui de nobis tenent in capite per servicium militare vel per serjanciam vel de wardiis in manu nostra existentibus quod habeant ad nos Londoniis totum servicium suum debitum.'

[1] Matt. Westm. p. 430; Stubbs, Const. Hist. ii. 135.

[2] From Bartholomew de Cotton (Hist. Ang. p. 327) we learn that in the

of the political party which forced from the King the *Confirmatio Chartarum*, may require some qualification. They were probably actuated quite as much by personal claims as by motives of true patriotism. But whatever were their motives, it is mainly to their combined courage and prudence, and to the patriotic exertions of Archbishop Winchelsey, that we owe the addition of 'another pillar to our constitution not less important than the Great Charter itself.'[1] In his extremity, Edward determined to appeal to the people. Having made friends with the Archbishop, and restored the confiscated lands of the see of Canterbury, he proceeded, on the 14th of July, to make a public harangue, standing upon a wooden stage erected in front of the great hall at Westminster, and accompanied by his young son Edward (afterwards Prince of Wales), together with the Archbishop and the Earl of Warwick. With visible emotion (*erumpentibus lacrymis* are the words of the chronicler) he humbly asked forgiveness for his past acts, admitting that he had not governed them so well and peaceably as became a King; but reminding them that such small portions of their property as they had given him, or as his servants without his knowledge had extorted, had been accepted by him in order that by the expenditure of a part the bulk might be possessed in greater quietude, and that he might be enabled to overcome the injurious attempts of enemies who were thirsting for English blood. 'Behold,' he added, 'I am going to expose myself to danger for your sakes; I pray you, if I return, receive me as you have me now, and I will restore to you all that has been taken. But if I return not, crown my son as your King.'[2]

Edward's speech to the people.

The hearts of the people were touched by this politic and affecting address; and with uplifted hands they pro-

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same year 'concessit dominus rex omnibus qui debebant sibi servitium, et omnibus viginti libratas terræ habentibus, *non teneri ire secum in Flandriam, nisi ad vadia et pro stipendiis dicti regis.*'

[1] Hallam, Middle Ages, iii. 3.

[2] Matt. Westm. p. 430.

mised fealty to the King. But Edward was still in want of money: and the barons, when appealed to, insisted on the various grievances of the nation, and demanded the confirmation of the Charters. By promising to comply with this demand the King ultimately, after many of the barons had departed, induced an irregular assembly of some of the barons and others who had attended the military summons, to make an illegal grant of an 'eighth' from the barons and knights and a 'fifth' from the towns.[1] After a vain effort to negotiate with the absent Constable and Marshal, Edward gave orders (July 30) for the collection of the eighth and fifth, and again directed the seizure of all the wool of the kingdom, promising to pay for it as soon as he was able.[2] The clergy, who were still hampered by the prohibitions of the Bull *Clericis Laicos*, expressed (Aug. 10) their willingness to make a grant as soon as they could obtain the Pope's permission, which they had good hopes of getting.[3] But the King, impatient at the delay, directed the seizure of a third of their temporal goods.[4] A few days previously he had issued a manifesto to the people justifying his action in the dispute with the two Earls, excusing his exactions as being necessary for the defence of the nation, and promising to set all things right on his return.[5] Shortly afterwards, while the King was at Winchelsea preparing to embark, messengers arrived from the Earls and presented to him what, to anticipate the language of a later age, may be termed a Grand Remonstrance in the name of the 'archbishops, bishops, abbots and priors, earls and barons, and the whole community of the land,' setting forth the evils of which they complained

A Grand Remonstrance presented to the King.

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[1] Matt. Westm. p. 430.
[2] Rot. Parl. i. 239; Barth. Cotton, Hist. Ang. 338.
[3] Barth. Cotton, Hist. Ang. 327, 335.
[4] Palgrave's Parl. Writs, i. 396. All articles dedicated to spiritual purposes were excepted, and clerks whose benefices were under 5 marks in value were exempt. Lay fees of the clergy, not appurtenant to their churches, were to be taxed with those of the laity: but they might be quit of the whole by payment of a fifth of their goods temporal and spiritual.
[5] Rymer, i. 372; Stubbs, Const. Hist. ii. 137.

and demanding redress. (1) In the first place, they said, it seems to the whole community of the land that the summons made to them by the King's writ was not sufficient, because it did not mention any certain place to which they were to go; yet it was on the place that the nature of the outfit and requisite amount of money depended. But whether they were bound to serve or not, it was commonly said that their lord wishes to cross the sea to Flanders, and it seems to them that there they are not bound to perform any service whatever; for neither they nor their predecessors or ancestors ever served in that land. Even if they were bound to serve there or elsewhere, yet they have not the necessary means; so afflicted are they by divers talliages, aids, and prises (to wit, of corn, oats, malt, wool, hides, oxen, kine, salt meat), exacted without payment of a single penny by which they might sustain themselves. (2) Further, they say they are unable to grant an aid, because of their poverty arising from the aforesaid talliages and prises; for they have hardly wherewithal to support themselves, *et multi sunt qui nullam sustentationem habent, nec terras suas colere possunt.* (3) They are not dealt with (*tractantur*) according to the laws and customs of the land as their ancestors were wont to be dealt with, nor have they the liberties which they were wont to have, but are arbitrarily refused them: for they were wont to be dealt with in accordance with Magna Charta, but now all its provisions are disregarded to the exceeding damage of the whole people. Wherefore they beseech their lord the King to correct these things, both for his own honour and the salvation of his people. (4) Moreover, the Community of the land feels itself sorely aggrieved by the Assize of the Forest, which is not kept as formerly; neither is the Charter of the Forest observed, but attachments are made at will, beyond the jurisdiction, contrary to custom. (5) The tax on wool is too heavy, namely 40*s.* on each sack, and of broken wool 7 marks, [=£4 13*s.* 4*d.*] per sack; for the wool of England amounts to the value of half the whole land, and the tax paid on it

[*Articuli quos Comites petierunt Nomine Communitatis.* Hemingburgh, ii. 121.—Ed.]

[Rishanger, 175.]

to a fifth part of the value of the whole land. (6) Lastly, the Community wishing, as it ought to wish, honour and safety to the King, considers it not for the King's good that he should go into Flanders unless he have further assurance as regards the Flemings, both for himself and his people; and further, on account of Scotland, which is already beginning to rebel now that he is going, and will assuredly do worse when they know that he has crossed the sea. Nor is it Scotland only that has to be considered: there are other lands also which are not yet duly secured.[1]

To this Remonstrance the King declined to return any specific answer without the advice of his Council, part of which had already sailed for Flanders while the other part was in London.[2] A few days afterwards (Aug. 22), he himself proceeded to Ghent, leaving his son, Edward, Prince of Wales, as Regent. As soon as the King had departed, the Earls seized the opportunity to press their demands. Entering the Exchequer they peremptorily forbade the Barons there to levy the aid, the grant of which they asserted had been illegally obtained, until the Charters had been confirmed. Supported by a large military following, and backed up by the citizens of London, they were masters of the situation, and the young Prince and his Council found it necessary to yield. The *Confirmatio Chartarum*,[3] which, although a statute, is drawn up in the form of a charter, was passed on the 10th of October, 1297, in a Parliament at which knights of the shire attended as representatives of the commons, as well as the lay and clerical baronage. It was immediately sent over to King Edward at Ghent, and there confirmed by him on the 5th of November following.[4] The former grant of an eighth

The statute *Confirmatio Chartarum*, passed 10th Oct. 1297.

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[1] Rishanger, Chron. 175–6. [*s.a.* 1297.]

[2] *Ibid.*

[3] 25 Ed. I. st. 1, c. 6.

[4] In 1298, the Earls of Hereford and Norfolk, doubting the King's sincerity or the binding force of his confirmation at Ghent of his son's acts, demanded a second formal confirmation. This the King reluctantly granted on the 8th of March, 1299, but with a comprehensive proviso, as to the forests, saving the

and a fifth was treated as invalid, and a fresh grant of a ninth was substituted.[1] The Constitutional opposition had now been completely successful. The *Confirmatio Chartarum* was not merely a reissue of Magna Charta and the Charter of the Forest, with special provisions for their distribution throughout the realm and annual publication, but the enactment of a series of new provisions intended to deprive the Crown in the future of its assumed right of arbitrary taxation.

By the 5th section of this statute the King expressly renounced as precedents the 'aids, tasks, and prises' before taken. The next section proceeds :—

'vi. Moreover we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy Church, as also to earls, barons, and to all the commonalty of the land, that for no business from henceforth *will we take such manner of aids, tasks, nor prises, but by the common consent of* [*all*] *the realm, and for the common profit* thereof, saving the ancient aids and prises due and accustomed.'

By section vii. the 'maltolte of wools, that is, to wit, a toll of forty shillings for every sack of wool,' is released, and the King grants 'that we shall not take such thing nor any other' without the common assent and good-will of the commonalty of the realm, 'saving to us and our heirs the custom of wools, skins, and leather granted before by the commonalty aforesaid.'[2]

The saving words in this statute would appear to have

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rights of the crown ('salvis semper juramento nostro, jure coronae nostrae, et rationibus nostris atque calumpniis ac omnium aliorum.') The openly-expressed discontent of the people at this unlooked-for reservation induced Edward to repeat the process shortly afterwards without the obnoxious 'salvo.' The charters were twice again confirmed by Edward, in the *Articuli Super Cartas*, on March the 6th, 1300, and finally on the 14th of February, 1301, in return for a subsidy of a 'fifteenth.' Notwithstanding this, Edward secretly sought and obtained, in 1305, from Pope Clement V. an absolution from the observance of the Confirmation of the Charters; but to his credit be it said, the absolution, except as to the Forest articles, was never acted upon.

[1] Palgrave's Parl. Writs, i. 63.

[2] Statutes of the Realm, i. 124.

preserved to the King the ancient custom on wool (as distinguished from the 'evil toll'), and even the legal right of talliaging the towns and Royal demesne, a right which he exercised in 1304.[1] But although not formally taken away, talliage without consent of Parliament was clearly contrary to the interpretation of this statute given in the *De Tallagio non Concedendo.* This document is now admitted not to have been an actual statute, but we are at least justified in regarding it 'as good evidence of a principle which, from the time of the Confirmation of the Charters, has been universally received.'[2] The exclusive right of Parliament to impose taxation, though often infringed by the illegal exercise of prerogative, became from this time an axiom of the Constitution.

De Tallagio non Concedendo. [1297.]

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[1] See the king's writ in Rot. Parl., i. 266. There was also an 'ancient prise' of wines imported,—a duty of two tons from every vessel.

[2] Freeman, Growth of English Constitution, [195].

The 'Statutum de Tallagio non Concedendo' is quoted as a statute in the preamble of the Petition of Right, and *thenceforth* acquired the authority of a statute. In 1637 it was decided to be a statute by the Judges: but there is now no doubt that originally it was a mere 'abstract, imperfect and unauthoritative, of the regent's act of confirmation and of the pardon of the two earls.' —See Stubbs, Select Chart. 487; and Hallam, Midd. Ages, iii. 4, n. The material words are:

'Nullum tallagium vel auxilium per nos vel haeredes nostros de cetero in regno nostro imponatur seu levetur, sine voluntate et assensu communi archiepiscoporum, episcoporum et aliorum praelatorum, comitum, baronum, militum, burgensium, et aliorum hominum in regno nostro.'

[Dowell, *Hist. of Taxation*, i. 66, gives the following account of the last attempt, made by Edward III. in 1332, at obtaining tallage without consent of Parliament. 'On obtaining the grant of a fifteenth and a tenth from Parliament, Edward recalled the Commissions for tallage, and promised in future not to cause tallage to be assessed in any other manner than had been the practice in the time of his ancestors, and as he might of right.' Tallage now, says Dowell, fell into disuse.

With regard to the Aid *pur fille marier*, taken by Edw. I. 1290 (*supra*, p. 256), fresh information has been printed, *Eng. Hist. Rev.*, April, 1890, from the Archives of Aragon, Jaime I., Parcht. No. 1173, by Mr. F. Darwin Swift, in the text of the Treaty of Alliance by Marriage between the Infante D. Pedro of Aragon, for his son, Alfonso (III., *ob.* 1291), and the '*filia primogenita*' of Edw. I., dated. 'vii. Id. Oct.' 1273. 'in villa Sordue . . . . Testt., Ausitanense Archiep. [Auch, Primate of Aquitaine.—ED.] . . . . Ep. Lectorense [Lectoure, nr. Auch.—ED.], Ethivarde de Chabbenays comite Bigorre, ... Rogero de Clifford, Johanne de Boun, militibus et Antonio Bek clerico . . . . dom. Regis.' The date of this Treaty seems to make it certain that Joan [*b.* 1272, *Cont. Flor. Wig.*] was not, and almost certain that Eleanor was, the eldest daughter of Edw. I., and to place Eleanor's birth, most probably, as *Ann. of Eng.*, in 1264.—ED.]

CHAPTER VIII.

GROWTH OF PARLIAMENT.

(1295—1399.)

23 EDWARD I.; EDWARD II.; EDWARD III.; RICHARD II.

The National Parliament gradually wins back an active control over all the affairs of the nation.

WE have seen that under Edward I. the *Commune Concilium Regni*, which for a time, after the Norman Conquest, had been absorbed into the feudal *Curia Regis*, again emerged as a really national Parliament, in which all the political elements of the nation were present either in person or by representation. But although complete in its representative character, Parliament had yet, as a whole, to make good its powers; and the newly admitted Commons to vindicate their right to an equal, and ultimately to a preponderating, share in the government of the country. The King was at all times in theory bound to act with the 'counsel and consent' of the great Assembly of the Nation. But by the overthrow of the old Feudal party under Henry II., and the break-up of the new National combination which, until the death of De Montfort, had successfully opposed the misgovernment of Henry III., the King had in reality acquired and exercised, through the medium of his Continual or Ordinary Council, a power little less than despotic. In the growth of Parliament, from the date of its definitive establishment under Edward I., we shall trace the process by which the National Council gradually won back that active control over all the affairs of the nation, which the ancient Witenagemot always, and even the feudal Great Councils at times, had undoubtedly exercised.[1]

[1] The comprehensive functions of the Witan have already been discussed, *supra*, pp. 33–38. Dr. Freeman (Norm. Conq. ii. 90) cites an instance of a

Parliament divided into two Houses.

The exact date of the division of Parliament into two Houses is not quite clear, but it was completely effected before the middle of the fourteenth century.[1] It must be

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debate in the Witenagemot under Edward the Confessor, on a question of war or peace. In 1242, Henry III. being desirous, at the request of his mother Isabella and her husband the Count de la Marche, of resuming the war with France, submitted the question to a Great Council at Westminster, at the same time demanding an aid. A great debate ensued, of which a detailed account is given in Matthew Paris. The magnates unanimously determined that it was the king's duty to observe the truce then subsisting so long as it was not violated by the French king ; and with respect to the aid asked for 'responderunt eidem domino regi praecise quod nullum ad praesens ei facerent auxilium.' An early instance of control by the national council over the public expenditure had occurred a few years previously in 1237, when the thirtieth granted to the king as the price of one of his numerous confirmations of the Charter, had been paid into the hands of four of the barons to be expended at their discretion 'for the benefit of the king and kingdom.'—Matt. Paris, 581, 582.

[Guizot, Hist. du Gouv. Rep. ii. 318, points out that the representative system, when established in its fulness, brought back the English Parliament to its original position. 'Le Parlement est redevenu le grand conseil national où sont débattus et réglés tous les intérêts nationaux.'—ED.]

[1] The first mention in the Rolls of Parliament of a separate session occurs in 1332 (Rot. Parl. ii. 66). From 1339 the division may be regarded as permanent. In 1352 the Chapter House of Westminster Abbey was the Chamber of the Commons. (Rot. Parl. ii. 237 ; Stubbs, Const. Hist. iii. 429, 430.) The advantages of the '*Bi-cameral system*' as a guarantee for orderly and permanent government have been forcibly stated by the American writers, Kent, Story, and Lieber, and by Jeremy Bentham and Bowyer in our own country. A brief summary of them is given in Sir Edward Creasy's Eng. Const. 198. But it should be noted that it was only the *accidental* circumstance of the withdrawal of the clergy from all interference in secular legislation that prevented us from having, as was generally the case in continental constitutions, *three* houses of Nobles, Clergy, and Commons.—(*Supra*, pp. 262, 263.) Stubbs (Const. Hist. ii. 189) points out that there was even at one time a possibility that the lawyers and the merchants might have been grouped in separate sub-estates. [Mr. Sheldon Amos, *Science of Politics* (Int. Sc. Series), 1883, pp. 236–46, discusses the various aspects of the question of 'the superior advisability of having one or more chambers,' summing up in favour of 'one broadly representative Chamber,' as best ensuring alike 'effective representation, harmonious co-operation, timely concession, apt adjustment, and habitual preference of the more pressing to the less pressing claim.' On the other hand, a recent writer in the *Quarterly Review*, No. 316, for October, 1884, in an article on the *Nature of Democracies*, forecasting the drift of the political situation in our country in the direction of a single Chamber, sees nothing but danger in the prospect. 'We are drifting,' the Article concludes, p. 332, 'towards a type of government associated with terrible events—a Single Assembly, armed with full powers over the Constitution, which it may exercise at pleasure. It will be a theoretically all-powerful Convention, governed by a practically all-powerful Secret Committee of Public Safety, but kept from complete submission to its authority by Obstruction, for which its rulers are always seeking to find a remedy in some kind of moral guillotine.' This seems to be an extreme view, expressed in rather extreme language. But, on the assumption that there are those who seek such a change, there is no denying the truth of the calmer statement in another Article in the same number of the *Quarterly*, p. 592, on

borne in mind that the Commons consisted of two elements, the knights of the shire and the burgesses. The knights belonged socially to the same class as the barons, and had, moreover, originally possessed an equal right with them to attend in person. On the introduction of County representation the knights of the shire, although elected not merely by the immediate tenants of the King, but by all the freeholders of the county, naturally continued to sit, deliberate, and vote with the greater barons.[1] But the representatives of boroughs, belonging to a lower social grade, and entering Parliament in virtue of a newly-acquired right, formed from the first a distinct assembly, deliberating and voting apart. Whether they sat in a separate chamber, or at the bottom of Westminster Hall, while the lords and knights occupied the upper end, is a matter of little importance. The separation of the burgesses is evident from the grants of subsidies which, for many years after the introduction of the Commons, were voted in different proportions by (1) the earls, barons, and knights, (2) the clergy, and (3) the citizens and burgesses.[2] There is reason to believe that the knights, even while still voting apart, occasionally joined with the burgesses in petitions. In the 8th of

Two elements of the Commons, knights and burgesses.

The knights at first deliberated and voted with the barons, apart from the burgesses.

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the *House of Lords and the Government*, that 'to dispense with a Second Chamber, to vest unlimited, unqualified, indisputable, unquestionable power in a single Assembly is a revolution; a revolution far more complete and searching than the expulsion of a dynasty or the reconstitution of the Third Estate.' Whether such a Revolution is or is not imminent is another question.—ED.]

[1] [It would have been more satisfactory if authority had been cited for this statement, and also for the application of the epithet 'distinct assembly,' where 'estate' would seem a more accurate description of the position of the burgesses. Perhaps both statements may be considered to be in the nature of a suggestion. The separation is said to have originated *circa* 1289, though not completely carried out till the middle of the 14th century. To this effect, Clifford, *Hist. Priv. Bill Legisl.*, vol. i. 275, where it is admitted that the period of the separation 'cannot be fixed with precision.'—ED.]

[2] In 1296, the barons and knights and the clergy gave each a twelfth, the burgesses an eighth; in 1305, the barons and knights and the clergy gave a thirtieth, the burgesses a twentieth; in 1308, the barons and knights gave a twentieth, the clergy and the burgesses each a fifteenth. In the 6th of Edward III. (1333) the rates were for the barons and knights and the clergy a fifteenth, for the burgesses a tenth; but on this occasion the knights and burgesses deliberated, although they did not vote, in common. In 1345 the knights granted two fifteenths, the burgesses one fifth, while the lords promised to follow the king in person and granted nothing.—Parl. Hist. i. 206; Rot. Parl. ii. 66.

Edward II. (1315) 'the Commons of England [in another part of the record they are termed 'le poeple'] complain to our lord the King and his council;' and there are several other petitions in the 19th of the same King, from the body of the Commons in Parliament (voz liges gentz . . . pur tote la Com[m]une, les gentz de la Com[m]une de vostre Roialme).[1] At length, in 1347, we find the Commons, without distinction, granting two-fifteenths from the cities, boroughs, ancient demesnes of the Crown, and the counties. The complete fusion of the two elements of the Lower House into one assembly,—the result of one of those unions of happy accident and practical wisdom, to which the English Constitution owes so much—was fraught with the most important consequences. The knights, who represented the landed property of the country, gave to the House of Commons, from the first, stability, weight, and permanence, and obtained for it a respect which the citizens and burgesses alone could not have commanded, in a country so permeated with feudal ideas as England then was. Without the knights of the shire the burgesses would have been mere deputies to consent to taxation and advise on matters of trade; united with them on equal terms, they were enabled at once to claim a voice in the government of the nation, and to defend the liberties of the people against both King and nobles.[2] The commingling of the knights and burgesses in a single House was rendered possible by the existence in the English Constitution of a peculiarity which most prominently and honourably distinguished it from nearly every kindred Constitution in Europe,—the

Union of knights and burgesses in one House.

Important consequences of this union.

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[1] Rot. Parl. i. 430.

[2] 'C'est là,' remarks M. Guizot, 'le grand fait qui a décidé la destinée politique de l'Angleterre. A eux seuls, les députés des bourgs n'auraient jamais eu assez d'importance, assez de force pour former une Chambre des Communes capable de résister tantôt au roi, tantôt aux hauts barons, et de conquérir, sur les affaires publiques, une influence toujours croissante. Mais l'aristocratie ou plutôt la nation féodale s'étant coupée en deux, et la nation nouvelle qui se formait dans les villes s'étant fondue avec les franctenanciers des comtés, de là sortit une Chambre des Communes imposante et nécessaire. Il y eut un grand corps de nation indépendant et du roi et des grands seigneurs.'—Hist. du Gouvern. Rep. ii. 276.

A nobility, but no noble caste in England.

absence of an exclusive noble caste. In most of the Continental states the nobles formed a distinct class, distinguished, by privileges inherent in their blood, from ordinary freemen, and transmitting their privileges, and in some countries their titles also, to *all* their descendants in perpetuity. The words 'nobleman' and 'gentleman' were strictly synonymous; the Estate of the Nobles (wherever the system of estates obtained), represented in the National Assembly not only the high nobility, but the class who in England formed the 'landed gentry,' and the Commons, the *Tiers Etat*, consisted almost exclusively of citizens and burgesses. In England, on the contrary, the privileges of nobility have always, except perhaps in the days of the ancient *Eorlas*,[1] been confined to one only of the family at a time, the actual possessor of the peerage. The sons of peers are commoners, and on a perfect equality, as regards legal and political privileges, with the humblest citizen. Even the eldest son, the heir to the peerage, though he may bear a title by courtesy, is still, so long as his father lives, a commoner like his younger brothers.[2] No restraint seems ever to have lain upon the free intermarriage of all ranks.[3] The highest offices of the state were always legally

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[1] [There is a certain vagueness about this suggestion. The alleged privilege in the members of the family of an Earl seems, as far as the author's meaning is clear, to have been rather a statement of the genealogical fact that a given man was of Earl kind, *i.e.*, of the kin of an Earl, than a privilege, and it is believed that it was of Scandinavian importation.—ED.]

[2] 'As the Law of England knows no classes of men except peers and commoners, it follows that the younger children of the King—the eldest is born Duke of Cornwall—are, in strictness of speech, commoners, unless they are personally raised to the peerage. I am not aware that either case has ever arisen, but I conceive that there is nothing to hinder a King's son, not being a peer, from voting at an election, or from being chosen to the House of Commons, and I conceive that, if he committed a crime, he would be tried by a jury.'—Freeman, Growth of Eng. Const. [93, 195].

[3] 'It was regarded as no disparagement for the daughter of a Duke, nay, of a royal Duke, to espouse a distinguished commoner. Thus Sir John Howard married the daughter of Thomas Mowbray, Duke of Norfolk, Sir Richard Pole married the Countess of Salisbury, daughter of George, Duke of Clarence. Good blood was indeed held in high respect; but between good blood and the privileges of peerage, there was, most fortunately for our country, no necessary connexion. There was therefore here no line like that which in some other countries divided the patrician from the plebian. Our democracy was, from an early period, the most aristocratic, and our aristocracy the most democratic in the world.' Macaulay, Hist. Eng. i. 30, 31. An earlier instance is the

Civil equality of all ranks below the peerage.

open to all freemen. All ranks, moreover, have at all times borne a share of the public burthens without claiming any of those unjust exemptions from taxation which the Continental *noblesse* habitually enjoyed.

Few things are more important in our early Constitution, or have exercised a more potent and beneficial influence upon the political and social condition of the people, than this civil equality of all ranks below the peerage. Had it been otherwise, the House of Commons could scarcely have become what it is at the present day. 'The knight of the shire was the connecting link between the baron and the shopkeeper. On the same benches on which sat the goldsmiths, drapers, and grocers, who had been returned to Parliament by the commercial towns, sat also members who, in any other country, would have been called noblemen, hereditary lords of manors, entitled to hold courts and to bear coat armour, and able to trace back an honourable descent through many generations. Some of them were younger sons and brothers of great lords. Others could boast even of royal blood. At length an eldest son of the Earl of Bedford, called in courtesy by the second title of his father, offered himself as a candidate for a seat in the House of Commons,[1] and his example was followed by others.'[2] In this way the House of Commons has at length come to represent not any single order in the State, but, with the exception of the actual members of the House of Lords, the whole nation; and, as a natural con-

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marriage in 1296 of Joan of Acre, daughter of Edward I. and widow of Gilbert de Clare, Earl of Gloucester, (*sup.* p. 256, *n.* 1) to Ralph de Monthermer, a handsome but needy knight ('quemdam militem, elegantem forma, sed tenuem substantia'). The anonymous author of the 'Opus Chronicorum' [*Trokelowe et Anon. Chr. et Ann.*, Rolls ed. p. 27] represents her as defending the alliance by saying: 'Non est ignominiosum neque probrosum magno Comiti, et potenti, pauperculam mulierem, et tenuem, sibi legitimo matrimonio copulare; sic vice versa, nec Comitissæ non est reprehensible nec difficile, juvenem strenuum promovere.' 'Placuit responsio ejus,' adds the chronicler, 'Domino Regi, et sic sopita est indignatio ejus et optimatum.'

[1] 'It was decided by votes of Parliament, both in the reign of Henry VIII. and in that of Elizabeth, that the eldest son of the Earl of Bedford was entitled to sit in the House of Commons.'—Earl Russell, Eng. Gov. and Const. 11.

[2] Macaulay, Hist. Eng. i. 38.

sequence, has drawn to itself 'the predominant authority in the state.'[1]

But the growth of the powers of the Commons has been very gradual. At first the burgesses deferred to their aristocratic associates the knights of the shire, and these naturally followed the lead of the barons.

Gradual growth of the powers of the Commons.

Under Edward II., jealousy of the successive favourites, Gaveston and the Spencers, threw the baronage into chronic opposition to the King; and on two occasions, in 1312 and again in 1321, drove them into open revolt. The ultimate deposition of the King was also mainly the work of the Barons acting in concert with the Queen. But it is noteworthy that in all these proceedings the sanction of Parliament was always regarded as necessary to legalise them; and the Commons, while acting in subservience to the Lords, were in reality gradually consolidating their own power. The appointment[2] of the 'Lords Ordainers'

Edward II. 1307–1327.

The *Lords Ordainers.*

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[1] May, Const. Hist. ii. 83: see also Freeman, Growth of Eng. Const. 96. The difference between the House of Commons as representing 'the whole community of England' and the House of Lords as representing only themselves, is strongly insisted upon by the writer of the 'Modus Tenendi Parliamentum.' The date of this treatise is uncertain, but it 'is found in manuscripts of the 14th century, and is shown by contemporary writs and records to be a fairly credible account of the state of Parliament under Edward II.' (Stubbs, Select Chart. 492–502.) Under the heading 'De Auxilio Regis,' the writer says, 'et ideo oportet quod omnia quae affirmari vel infirmari, concedi vel negari, vel fieri debent per parliamentum, per communitatem parliamenti concedi debent, quae est ex tribus gradibus sive generibus parliamenti, scilicet ex *procuratoribus cleri, militibus comitatuum, civibus et burgensibus, qui repraesentant totam communitatem Angliae*, et non de *magnatibus, quia quilibet eorum est pro sua propria persona ad parliamentum et pro nulla alia.*'—Mod. Tenend. Parl. (ed. Hardy) [Sel. Ch. 502].

[2] Bp. Stubbs (Const. Hist. ii. 327 [n. 2]) says 'Hallam was mistaken in supposing that the Commons co-operated' in the appointment. The details of the election of the Ordainers as given in Hemingburgh, ii. 276, and the [Vit. Edw.] Mon. Malmesb. 104, contain, indeed, no reference to the Commons, nor are they mentioned in the King's commission for the election as it appears in Rot. Parl. (Append.) i. 445, and Rymer, ii. 105. Writs of summons to the 'Parliament' which exacted this temporary supersession of the Royal authority are extant addressed to the Barons, but not to the Commons (Palgrave's Parl. Writs, II. i. 40, 41). The assembly was in fact a Great Council attended by the baronage in arms. Yet in Rot. Parl. i. 281 the Commons are distinctly stated to have been included in the Commission, which is declared to have been granted 'de nostre fraunche volunte par noz lettres overtes as Prelatz, Countes, et Barons, *et Comunes de dit Roiaume*, q'il puissent eslire certaines persones des Prelatz, Countes et Barons;' and in the preamble to the Ordinances, the Ordainers themselves, 'elected by virtue of the said

(twenty-one in number), in 1310, like the previous appointment of similar committees in the reigns of John and Henry III., and of the subsequent commissions of reform under Richard II., was an extraordinary and revolutionary remedy to meet exceptional circumstances. At the time when kings governed as well as reigned their personal character was of the utmost importance. The practical effect to the nation was much the same whether the King was wicked or only weak. When, from either cause, misgovernment reached a certain pitch of intensity, an attempt appears to have been made to reconcile the continuance of the King upon his throne with the enjoyment of good government by the people, by temporarily putting into commission, as it were, the powers of the Kingship. In Edward II.'s case, it was doubtless the personal jealousy of the barons against Gaveston and the King's other favourites, quite as much as a desire for the public weal, which actuated the Ordainers. Yet most of their comprehensive Articles of Reform, by which remedies were provided for the old and undoubted grievances of the nation, were highly beneficial; and others, which trenched on the prerogative of the Crown, were in many cases but anticipations of that direct Parliamentary control over the appointment of the King's Ministers, and the action of the Executive, which was subsequently attained for a time, and which is now exercised by Parliament indirectly. Among the Articles of this nature may be noted: (ix.) That the King should not leave the kingdom, or levy war, without the consent of the baronage in Parliament; and in the case of his absence with such consent, a guardian of the realm should be chosen by the common assent of the baronage in

Articles of Reform. [1312.]

Commission,' recite that it had been granted by the King 'as Prelatz, Countes et Barons, *et as autres bones gentz de son Roiaume.*' (Rot. Parl. i. 281). The assertion on the Parliament Roll of the co-operation of the Commons has, under the circumstances, a peculiar significance. The Constitutional right of the Commons to participate, on the principle *quod omnes tangit*, is tacitly admitted; and the value attached to such participation by the Ordainers is indicated by their assumption of it, whether based upon fact or not.

Parliament; (xiv.) That the Chancellor, two Chief Justices, Treasurer, and other great officers of the Crown should be chosen by the counsel and assent of the barons in Parliament; and (xxix.) That to prevent delay in the administration of justice, Parliaments should be holden once in every year, or twice if need be, and in convenient places.[1]

So early in this reign as 1309, the Commons manifested a knowledge of their power and rights by granting a subsidy '*upon this condition* that the king should take advice and grant redress upon certain Articles, in which their grievances were set forth.'[2] Their right to concur in legis-

Constitutional grant of a subsidy.

Right of Commons to

[1] Rot. Parl. i. 281. The Ordinances were annulled by st. 15 Edw. II. (1322), but several of the most popular were re-issued by the King in a Royal Ordinance. *Ibid.* 456.

[2] These Articles, eleven in number, present a concise summary of the grievances—arising in many cases from distinct violations of the existing law—by which the nation had been more or less oppressed under all the successors of Henry of Anjou, which the Lords Ordainers endeavoured to redress in 1311, but which continued for at least another century to form the burthen of the complaints of the Commons in Parliament. (See Hallam, M. A. iii. 40.) They are to the following effect:—'Les bones gentz du roialme qi sont cy venuz au Parlement,' after a general prayer for the observance of the Great Charter, and that the oppressions of 'those who call themselves the King's servants' may be restrained, specifically complain: 1. That the King's purveyors seize great quantities of corn, malt, meat, and other provisions, without any payment, not even by tallies. 2. That new customs are exacted on wine, cloth, and other imports whereby the price to the people is enhanced. 3. That the current coin is accepted by traders at only half its nominal value, notwithstanding the King's proclamation to the contrary. 4, 5. That the Steward and Marshal illegally enlarge their jurisdiction beyond measure, to the oppression and impoverishment of the people. 6. That the Commons find no one to receive petitions in Parliament, as in the time of the King's father. 7. That the collectors of the King's dues (pernours de prises) at fairs and in cities take prises of commodities in excess of the King's needs, and barter away the surplus for their own advantage. 8. That men are delayed in their actions at law by writs of protection. 9. That felons escape punishment by too easily procuring charters of pardon so that those who have indicted them are afraid to stay in their own districts, and many forbare, on this account, from prosecuting. 10. That the constables of the King's castles take cognizance of common pleas. 11. That the King's escheators oust men of lands held *in capite* by them and their ancestors from time immemorial, under pretence of an inquest of office, without summoning them before the King's Court. Edward accepted all the articles unreservedly, except the second, which had reference to the new customs of 2*s.* on the ton of wine, 2*s.* on the piece of foreign cloth, and 3*d.* on the pound avoir-du-pois of other merchandise, originally conceded to Edward I. by the foreign merchants in 1303. As to this the King, at the request of the people, granted that the 'little custom' should be taken off until it should appear whether any advantage would accrue to him and his people thereby, and afterwards he would take counsel thereon. The 'ancient prises and cus-

Summary of grievances in 1309.

concur in legislation.

lation was affirmed in 1322, by the Act which repealed the Ordinances made by the Lords Ordainers in the 5th year of Edw. II.[1] It was declared that 'the matters which are to be established for the estate of our lord the King and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in Parliaments by our lord the King, and by the assent of prelates, earls, and barons, *and the commonalty* of the realm, according as it hath been heretofore accustomed.'[2]

Edward III. 1327–1377.

Under Edward III. the Barons, instead of opposing the King, rallied round the throne, and the Commons, ceasing to be mere auxiliaries of the Lords, became the chief asserters of Constitutional rights against the arbitrary power of the Crown. They did not, however, so much curb the Royal power as consolidate their own. No reign, perhaps, is so replete with illegalities as [that of] Edward III.; but they were admitted to be exceptions, and disowned as precedents, while the legal rule was firmly established.

Regularity of meeting of Parliament.

The regularity with which Parliament was assembled by Edward III. confirmed the power of the Commons, by affording them an opportunity for its frequent exercise. To defray the enormous expenses of his wars, the King was perpetually compelled to solicit the aid of his people, and during the fifty years of his reign, forty-eight sessions of Parliament are recorded.

Annual Parliaments.

It was, moreover, twice declared by statute (as it had been previously directed by the Lords Ordainers in 1311), that Parliament should be held annually—by which appears

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toms anciently due and approved' were not to be affected. In 1310 the 'little custom' was again imposed, on the ground that no reduction in prices had followed the remission. (Parl. Writs, II. ii. 30.) In the following year the Ordainers declared it illegal.

[1] [On the early concurrence of the Commons in legislation, see Clifford, *Hist. of Private Bill Legislation*, 1885, vol. i. p. 288. Mr. Clifford says that 'when the commons are not named in early statutes, their assent may be presumed from the fact that most measures originated with their petitions.' This statement, however, seems a little too broad, as it would, if unqualified, import the assent of the Commons in cases where we know that, as a matter of fact, it was not given, *e.g.*, *De Hæretico Comburendo*. But it may perhaps be taken as generally true, where there are not rebutting circumstances.—ED.]

[2] Statutes of the Realm, 15 Edw. II., i. 189.

to have been meant, not that there should be annual sessions of the same Parliament, but a newly elected Parliament every year.[1] Thus, in 1330, it was enacted: 'A Parliament shall be holden every year once, and more often if need be;' and again in 1362:—'For redress of divers mischiefs and grievances which daily happen a Parliament shall be holden every year, as another time was ordained by statute.'[2]

The Commons establish *three great rights* [*t. Edw. III.*]:

During the long reign of Edward III.,[3] the Commons succeeded in firmly establishing as essential principles of our government three great rights:—

1. That all taxation without the consent of Parliament is illegal.

2. The necessity for the concurrence of both Houses in legislation.

3. The right of the Commons to inquire into and amend the abuses of the administration.

Growing out of these main rights, two derivative rights were also exercised by the Commons for the first time: (*a*) The right to examine public accounts and appropriate the supplies, which was involved in Nos. 1 and 3; and (*b*) the right to impeach the King's Ministers for misconduct, which was a corollary to No. 3.

(i.) *Taxation without consent illegal.*

I. Ever since the enactment of the *Confirmatio Chartarum*, the illegality of levying aids or imposing talliages by the sole authority of the King, had been an admitted principle of the Constitution. But both Edward I. and his son still continued occasionally to raise money in defiance

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[1] See Stubbs, Const. Hist. iii. 380.

[2] 4 Edw. III. c. 14; 36 Edw. III. st. 1, c. 10. (Stat. of the Realm, i. 265, 374.) In the year 1328, no less than four Parliaments were held; three in 1340; and two in one year were not infrequent towards the end of Edward III.'s reign and during the early years of his successor. Stubbs, Const. Hist. ii. 613.

[3] In the last year of Edward's reign, 1377, the Rolls of Parliament contain the first mention of a Speaker of the House of Commons, expressly named as such, 'Monsieur Thomas de Hungerford, Chivaler, *qi avoit les paroles* pur les Communes d'Engleterre en cest Parlement.' (Rot. Parl. ii. 374.) Peter de la Mare, who was elected Speaker in Richard II.'s first Parliament, had acted in that capacity, but without the name, in the Good Parliament of 1376. [In Scotland a Speaker seems to be first mentioned in the Act 1427.—ED.]

of this statute, and Edward III. constantly levied arbitrary imposts of every kind. The Commons, however, by their continual remonstrances, their conditional grants, and their liberal subsidies, whenever the King applied to them for aid, succeeded at length in establishing 'the *practice* of what was before the *law*, the right of the people to tax themselves.'[1]

In 1332 (6 Edward III.), a rebellion having broken out in Ireland, the King assigned certain commissioners to talliage the cities, towns, and Royal demesnes throughout England; but finding it still necessary to apply to Parliament he revoked these commissions, at the request of the prelates, earls, barons, and knights of the shire, and in consideration of the grant by the Lords and Commons of a subsidy, promised that in time to come he would not set such talliage, except as it had been done in the time of his ancestors, and as he might reasonably do.[2]

In 1339 (13 Edward III.), the prelates, earls and barons made a grant of one-tenth of their corn, fleece, and lambs, but only on the assurance of 'some graces to the great and small of the kingdom,' and with a stipulation that the 'maltolt,' or illegal custom on wool, should be abolished, and their present grant not drawn into precedent. The Commons professed themselves most willing to grant a subsidy, but unable to do so without first consulting their constituents, for which purpose they desired that another Parliament might be summoned. And they prayed that the sheriffs be directed that no knight of the shire be returned to the next Parliament who is himself a sheriff or other official. They complained of the increased imposition on wool and lead, and boldly asserted that 'inasmuch as it is inhanced without assent of the Commons, or of the Lords, as we understand,' 'any one of the Commons may refuse it (le puisse arester) without being troubled on that account (saunz estre chalangee).'[3]

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[1] Lingard, Hist. Eng. iv. 127.
[2] Rot. Parl. ii. 66.
[3] Rot. Parl. ii. 104, 105; and see Hallam, Middle Ages, iii. 44.

Four years later, in 1343 (17 Edward III.), the King being much pressed for money, assembled, with the concurrence of the Lords, a council of merchants, and procured from them, without the assent of the Commons, a grant of forty shillings on every sack of wool that should be exported. It seems to have been contended that this duty did not fall upon the people, but upon the foreign purchaser; but the Commons in their remonstrance, showed that they possessed some rudimentary knowledge of the principles of political economy, alleging that the tax actually fell on the seller, the foreign merchants refusing to give the accustomed price on account of the additional duty.[1]

In 1346 (20 Edward III.) Parliament prayed the King that this forty shillings on the sack of wool might be taken off; but it was answered that the prelates and other magnates [grantz], seeing the necessity of the King, had assented, with the accord of the merchants, that he should have the said subsidy of wool for the prosecution of the war; and that as it had been pledged to his creditors it must continue; whereupon the Commons gave way.[2] In 1363, however, upon the petition of the Commons, [no] grants of subsidies upon wool were [to be] made by merchants without the consent of Parliament.[3]

In 1348 (22 Edward III.), the Commons made a conditional grant and required the conditions—the most important being that the King should thenceforth levy no 'imposition, talliage, or charge by way of loan or in any other manner, without the grant and assent of the Commons in Parliament'—to be entered on the roll 'as a matter of record, whereby they may have remedy if anything should be attempted to the contrary in time to come.'[4] In these conditional grants originated the doc-

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[1] 'Voillez s'il Vous plest aver regard, que tut est en charge et a meschief de voz Communes. Par qoi cel meschief, si Vous plest, ne voillez soeffrir, mes soit amendez a cest Parlement: qar ce est encontre reson que la Commune de lour biens soient par marchandz chargez.' Rot. Parl. ii. 140.

[2] *Ibid.* p. 161.

[3] Rot. Parl. ii. 271.

[4] *Ibid.* p. 200.

trine and practice that 'supply should depend upon redress of grievances.'

But while conceding the technical illegality of the proceeding, Edward seems always to have claimed a kind of moral right to impose charges upon his subjects in cases of great necessity, and for the defence of the kingdom. This was asserted even in his last Parliament, in 1377;[1] and long previously, in 1339, with reference to the heavy impositions laid on the people on the occasion of the war with Scotland, the King had urged the same plea in a letter to the Archbishop of Canterbury: 'That whereas the people were burdened with divers charges, tallages, and impositions, which he could not mention but with much grief, yet being enforced by inevitable necessity, could not as yet ease the people of them, he required the archbishop to exhort the people patiently and humbly to bear the burden for a while, and to excuse him towards the people, hoping he should ere long recompense his said people and give them comfort in due time.'[2]

Appropriation of supplies [1353].

The first unequivocal instance of appropriation of supplies occurred in 1353, when a subsidy on wool was granted, to be applied solely for the purposes of the war.[3]

Audit of public accounts.

In 1340 a Parliamentary Committee was appointed to examine into the accounts of the collectors of the last subsidy; and in the following year it was enacted, at the request of the Commons, that commissioners should be assigned for a similar purpose.[4] Inquiry into the accounts of the collectors was the first step towards examining into the application of the money by the King's Ministers; but that some investigation of fiscal matters was absolutely

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[1] 'Et quant a ce que charge ne fuisse mys sur le people sanz commune Assent; le Roi n'est mye en volontee de le faire, sanz grande necessite, et pur la defense du Roialme, et la ou il le purra faire par reson.' Rot. Parl. ii. 366.

[2] See Broom, Const. Law, 271. [Denman's ed., 1885, p. 269; in Mr. Hakewill's argument, Bates's case.—ED.]

[3] Rot. Parl. ii. 252.

[4] Rot. Parl. ii. 130.

necessary at this time, if only for the purpose of obtaining statistics, is evidenced by the ludicrous miscalculation made by the Parliament in 1371 (45 Edward III.), as to the number of parishes in England. A subsidy was granted of £50,000, to be collected by an assessment of 22*s.* 3*d.* upon every parish, the number of parishes being assumed to be 45,000. After the Parliament had been dismissed, it was discovered that the number of parishes was not much more than 8,600, and that the sum raised would not exceed £10,000. To repair the error the King summoned a Great Council, at Winchester, consisting of one selected member out of the two who had sat in the last Parliament for each county, city, and borough. He excused himself for not summoning a full Parliament on the ground of relieving his people from the additional expense;[1] and the facts of the case having been laid before the assembly they increased the parochial assessment, of their own authority, to 116*s.*[2] No complaint appears to have been made of this irregularity, by which the main intention of Parliament was carried into effect. In the following year (1372) there occurred a more serious disregard of Constitutional formalities, tending to destroy the unity of the House of Commons by reviving the former separation of

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[1] Both knights of the shire and burgesses were from the earliest time entitled to receive wages, or more accurately, payment for expenses, from their constituents. The amount was fixed under Edward II., by the writs *de levandis expensis*, at 4*s.* a day for a knight and 2*s.* for a burgess. These writs, which were issued, after the dissolution of Parliament, at the request of the members who had served, may be regularly traced to the end of Henry VIII.'s reign (Prynne's Fourth Register, p. 495). After that time payments still continued to be made voluntarily by some boroughs to their representatives. Andrew Marvell, the witty member for Hull in the reign of Charles II., has been erroneously reputed the last recipient of a salary. But in 1681, three years after Marvell's death, Thomas King, Esq., who had been member for Harwich, obtained from the Lord Chancellor, after notice to the corporation of Harwich, a writ *de expensis burgensium levandis.* In 1830, a proposal to restore the practice of paying wages to members was included by Lord Blandford in a Reform Bill which he submitted to the House of Commons (Hansard, Deb. 2nd Ser. xxii. 678). The late Lord Chancellor Campbell, in his life of Lord Chancellor Nottingham, after citing the case of Thomas King, gave it as his opinion that the writ might still be claimed, and that no new law is required for those who desire to resume the ancient practice.

Payment to knights of the shire and burgesses.

[2] Rot. Parl. ii. 304.

the borough from the county members. After the petitions of the Commons had been answered, the knights were dismissed; but the burgesses were convened before the Prince of Wales and the prelates and barons 'in a chamber near the White Chamber,' and induced, as a return for the continual safe convoy of merchant shipping, to renew for a year a subsidy formerly granted upon imports.[1]

(ii.) *Legislation: concurrence of both Houses necessary.*

II. The right of the Commons to concur in legislation 'according as it hath been heretofore accustomed,' had been solemnly affirmed by Parliament in the 15th of Edward II. (1322), and is moreover proved by the form of the enacting words of statutes, both prior and subsequent to that date. From the year 1318 down to the accession of Edward III. the form invariably runs:—'by the assent of the prelates, earls, barons, and the commonalty of the realm.' Under Edward III. this form alternates with another, in which the share of the Commons is expressed as that of petitioners,—'at the request of the Commons and by the assent of the prelates, earls, and barons.' This was owing to the fact that at this time statutes were almost always founded upon the petitions of the Commons, which expounded grievances and prayed for specific remedies.[2] In 1340 (14 Edward III.) a joint Committee of both Houses, consisting of the Archbishop of Canterbury

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[1] Rot. Parl. ii. p. 310; and see Hallam, Middle Ages, iii. 47.

[2] Sometimes the Commons merely prayed for a declaration of the existing law, in which case their assent to the declaration in answer was usually assumed without being positively given. This was the case with the great Statute of Treasons (25 Edw. III. st. 5, c. 2). The petition upon which this Act is founded simply prayed that 'whereas the king's justices in different counties adjudge persons indicted before them to be traitors for sundry matters not known by the Commons to be treason, it would please the King by his council, and by the great and wise men of the land, to declare what are treasons in this present Parliament.' The king's answer to this petition, entitled 'A declaration which offences shall be adjudged Treason,' constitutes the existing statute. It was a matter of the greatest Constitutional importance that the law of Treason should be fixed and invariable. In subsequent reigns the law of Treason was frequently extended to offences not mentioned in this statute of Edward III.; but it was always a popular measure to reduce the crime to the limits of the ancient statute, which, with some modifications, remains at the present day the law on the subject.

and a certain number of bishops and barons (with whom were associated several of the Justices), and twelve knights and six burgesses, was appointed to convert such petitions and answers as were fit to be perpetual into statutes.[1] Matters of a temporary nature were usually regulated by Ordinances, which differed little from Statutes, except in their less solemn and less permanent character, and in the fact that they were usually made, not in Parliament, but in a Great Council. The Great Councils, however, sometimes contained all the elements of a Parliament; the only difference being that the summonses were not in Parliamentary form. But in ordinary cases the Lords and the King's Council were the only members. Notwithstanding the tendency of Ordinances to impair the legislative power of the Lower House, the dislike of the Commons for innovations in the statute law made them partial to the former species of legislation. Thus, in 1363 (37 Edward III.), when it was proposed to enact the first sumptuary laws, the Lords and Commons were asked, 'inasmuch as the matter agreed upon in Parliament was novel and unheard of before,' whether they would prefer an Ordinance or a Statute. They decided to proceed 'by way of ordinance and not by statute, in order that, if anything should need amendment, it might be amended at the next Parliament.'[2] The important 'Ordinances of the Staple,' which, among other things, prohibited English merchants from exporting wool under pain of death, were promulgated in a Great Council held in 1353 (27 Edward III.), at which one knight from each shire, and certain citizens and burgesses attended. The introduction of a new capital offence was clearly a matter which required the sanction of a regularly constituted Parliament. Conscious of the danger of departing from the legal form of the Constitution, the Commons present at the Great Council prayed 'that the said articles might be recited at the next Parliament and entered upon

Difference between Ordinances and Statutes.

Ordinances of the Staple.

[1] Rot. Parl. ii. 113.
[2] Rot. Parl. ii. 280; and see Hallam, Middle Ages, iii. 49.

the Parliament roll, for this cause that ordinances and agreements made in Council are not of record, as if they had been made in a general Parliament.' In the next Parliament the Ordinances were expressly confirmed 'to be holden for a statute to endure always,' and it was enacted at the same time, that no alteration or addition should be made in future without the assent of Parliament.[1]

(iii.) *Right of Commons to enquire into administrative abuses.*

III. On two occasions during the reign of Edward III., the Commons interfered with great boldness in matters of governmental administration.

Attempt to establish the responsibility of Ministers to Parliament, 1342.

(1) In the Parliament which met in April, 1341 (15 Edward III.), they made, in conjunction with the Lords, a praiseworthy but premature attempt to establish the responsibility of the King's Ministers to Parliament. Edward's quarrel with the Archbishop, John Stratford, and the proceedings instituted against that prelate in the Exchequer, had raised the question of the right of peers to be tried by their peers in Parliament, and a Committee of the Lords reported in the affirmative. When the question of supply came up, each of the Three Estates made a series of conditional demands, three of which are of special interest. (1) The Lords required a statute enacting, in conformity with the recent report of their committee: That when the King was prosecutor (*où le roi se fait partie*), no peer of the land, whether Minister or not, and whether on account of his office or for any other cause, should be brought to trial, lose his lands, tenements, goods or chattels, be arrested, imprisoned, outlawed or forfeited, or be bound to answer or be judged, except in full Parliament and before the peers; saving unto the King the laws rightfully used by

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[1] Rot. Parl. ii. 253, 257. [On the distinction between Ordinances and Statutes some interesting statements and criticisms will be found in Mr. Frederick Clifford's *History of Private Bill Legislation*, 1885, vol. i., p. 332. Mr. Clifford is not satisfied with some of the distinctions laid down by Dwarris. But it is clear that an Ordinance was subject to examination, and was then either confirmed as a Statute or annulled, and that seems sufficient to establish a broad line of demarcation between the two. The distinction here drawn is proved by the revision of Ordinances ordered at the prayer of the Commons, 1 Edw. III. Cf. Clifford, *loc. cit.*—ED.]

due process, and saving also suits between party and party.[1] The Lords and Commons together petitioned: (2) That Commissioners should be appointed to inquire into the accounts of such as had received the aids and other public monies; and (3) That the Ministers and Judges should be appointed in Parliament, and sworn to observe Magna Charta and the other statutes.[2]

The most important of these demands, and at the same time the most obnoxious to the King, were the Parliamentary appointment of the Ministers and Judges, and the auditing of accounts, which, combined, would at once have involved full Ministerial responsibility. Finding, however, that a subsidy could only be obtained on condition that the petitions were granted, the King reluctantly allowed them to be embodied in a statute; but with a slight modification by which he was still to appoint, 'with the advice of his *council*,' the Ministers and Judges, who however should be bound to surrender their offices at the next Parliament, and be there responsible to all having cause of complaint against them. The passing of this statute gave rise to the first protest on the rolls of Parliament, the Chancellor, Treasurer, and Judges, recording their dissent. On the dissolution of Parliament, Edward had recourse to the violent measure of declaring this statute null and void, in a proclamation addressed to all the sheriffs. He was,

First protest on the rolls of Parliament against the passing of an Act.

[1] Rot. Parl. ii. 127. Anciently Bishops would appear to have been regarded as Peers; and the claim of Archbishop Stratford to be called upon to answer in Parliament only, was admitted by the King. But Bishops have long been held to be 'lords of Parliament' only and not 'peers;' not being ennobled in blood, they are 'not of trial by nobility,' and would be tried for a capital offence by a jury of commoners. Lords' Standing Ord. No. 79, A.D. 1692; Trials of Bishop Fisher and Archb. Cranmer, 1 Howell, St. Tr. pp. 399, 771; May, Parl. Prac. pp. 15, [742]. [The expression 'Lord of Parliament,' appears to be here used by the author in a technical English sense, different from that which it bore in Scotland, where it was applied, in the 15th century, to certain members of the greater Baronage who at that time began to be made hereditary Peers as 'Domini Parliamenti.' According to the author's view it would seem that one of the modern Lords of Appeal, who are Life Peers only, and whose blood is therefore not ennobled, would be triable by a jury of Commoners. The question has fortunately not as yet arisen. It would be interesting, from a Constitutional point of view, to note the attitude taken in such a case by the House of Lords, whether in regard to a Bishop or a Lord of Appeal. —ED.]

[2] Rot. Parl. ii. 131; and see Stubbs, Const. Hist. ii. 389.

however, conscious of the gross illegality of his conduct, and in the following Parliament procured the formal repeal of the obnoxious Act.[1]

First instance of parliamentary impeachment.

(2) In 1376 (50 Edward III.) the Commons for the first time exercised the Constitutional right of impeachment. During the declining age of the King and the lingering illness of the Black Prince, John of Gaunt, Duke of Lancaster, had acquired the chief direction of affairs. His administration was exceedingly unpopular, and he appears to have been suspected by his dying brother of ambitious designs, inimical to the claims of young Richard of Bordeaux to succeed to the throne of his grandfather. The great increase in the power and influence of the House of Commons is remarkably brought out by the proceedings which took place in the 'Good Parliament,' as that which met in the 50th of Edward III. was long called among the people. Fifty years before, a combination of the Barons against the Lancastrian party would doubtless have been the form which the opposition would have assumed. Now, the Prince of Wales and the Earl of March (the husband of Philippa, daughter and heiress of Lionel, Duke of Clarence), found that the best means of effecting their object was by backing up the Lower House in a political attack upon the Government. The Commons voted a subsidy, but insisted that the Council should be strengthened by the addition of ten or twelve lords, prelates, and others, 'to be constantly at hand so that no business of weight should be despatched without the assent and advice of all.' After complaining, in general terms, that the King and kingdom had been greatly impoverished 'for the private advantage of some near the King, and of others by their collusion,' the Commons proceeded to impeach, at the bar of the House of Lords, two peers, Latimer and Nevill, who held office under the King, and four commoners, Lyons, Ellys, Peachey, and Bury, farmers of the customs

The Good Parliament.

Lords Latimer and Nevill impeached by the Commons, 1376.

Rot. Parl. ii. 139; Rymer, ii. 1177; and see Hallam, Middle Ages, iii. 51.

and of certain monopolies.[1] The grounds of impeachment were various, but the three principal allegations against the accused were: (1) That they had procured and advised the removal of the Staple from Calais, where it had been fixed by Parliament; (2) That they had lent money to the King at exorbitant usury; and (3), That they had purchased, at a low price, old debts due from the Crown, and afterwards paid themselves in full out of the Treasury. The House of Lords tried and convicted all the accused, with the exception of Bury, who did not appear to take his trial. Lord Latimer was expelled from the Council for ever and placed under arrest; Lord Nevill was deprived of all his offices; while Lyons, Ellys, and Peachey were imprisoned and placed at the King's mercy.[2] But the Commons were not yet strong enough to stand alone. By the death of the Prince of Wales (8th June, 1376), they lost their chief supporter. On the dissolution of the 'Good Parliament,' the Duke of Lancaster resumed the chief place in the administration; the new council of twelve was removed; the former partisans of the Duke returned to Court; and Sir Peter de la Mare (steward to the Earl of March), who had led the opposition in the House of Commons, was arrested under false pretences, and imprisoned in Nottingham Castle. In the following year a Parliament, packed with the Duke's supporters, illegally returned by the sheriffs at his request,[3] undid the work of its predecessors, and reversed the judgments given against the impeached Ministers. No testimony to the real advance in the power and importance of the Lower House can be stronger than this subversion of the measures of one House of Commons by another specially packed for the purpose.

A packed House of Commons.

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[1] 'Before that time, the Lords appear to have tried both peers and commoners for great public offences, but not upon complaints addressed to them by the Commons.'—May, Parl. Practice, p. [58].

[2] Rot. Parl. ii. 323-329.

[3] Lingard, Hist. Eng. iv. 104. Not more than seven of the knights who had sat in the 'Good Parliament' were returned to this one.—See the writs in Prynne's Fourth Register, 302, 311.

The Commons intervene in questions of war and peace.

The intervention of the Commons was not confined to questions of internal administration. Under Edward III. we find them constantly consulted and giving advice on questions of war and peace. Hallam calls this an 'unfair trick of his policy' in order to prevent any murmuring about subsidies required to maintain wars undertaken by common assent.[1] But we have seen that the consideration of questions of this nature was an ancient right of the National Council,[2] a body with which the Commons had now been long permanently incorporated; and it has been fairly contended that they voluntarily sought the exercise of this power, accepted the attendant responsibility, and gained greatly by so doing.[3]

In 1328, while Edward was still a minor, and Mortimer held the reins of power, the treaty of peace with Scotland, by which that kingdom was liberated from all feudal subordination to England, was concluded with the consent of Parliament, the Commons being expressly mentioned.

In 1331, the King consulted Parliament on the question of peace or war with France, and was advised in favour of peace.

Five years later, however, in 1336, we find them urging the King to war with Scotland, on the ground that 'the King could no longer, with honour, put up with the wrongs and injuries daily done to him and his subjects by the Scots.'[4]

Again, in 1341, in the first flush of Edward's French

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[1] Middle Ages, iii. 53.

[2] *Supra*, p. 273.

[3] Guizot, Hist. du Gouv. Rep. vol. ii. [To the same effect, Green, *Hist. of the English People*, 1878, i. p. 413, *sub* Edw. III.: 'With the difficulties of the Crown the weight of the two Houses made itself more and more sensibly felt. . . . With each supply some step was made to greater political influence. In his earlier years Edward [III.] showed no jealousy of the Parliament. His policy was to make the struggle with France a national one by winning for it the sympathy of the people at large; and with this view he not only published in the County Courts the efforts he had made for peace, but appealed again and again for the sanction and advice of Parliament in his enterprise.'—ED.]

[4] Parl. Hist. i. 93.

victories, the Parliament pressed him to continue the war, and voted large subsidies for that purpose.

In 1343 Parliament was asked to advise the King as to making peace with France. The Lord Chamberlain, Sir Bartholomew de Burghersh, announced on the part of the King that 'as the war was begun by the common advice of the prelates, great men, and Commons, the King could not treat of, or make, peace without the like assent.' The Lords and Commons, after separate deliberation, gave their opinion that the King ought to make peace if he could obtain a truce that would be honourable and advantageous to himself and his friends, but if not, the Commons declared that they would aid and maintain his quarrel with all their power.[1]

In 1344 Parliament, on being consulted, again urged that the war should be prosecuted energetically; but in 1348, when asked for advice (the expenses of the war having in the meantime proved exceedingly burthensome), the Commons returned a very discreet and guarded answer. 'Most dread lord,' they said, 'as to your war and the array thereof, we are so ignorant and simple that we cannot give you advice. We therefore pray your gracious lordship to excuse us, and that it please you, with the advice of the great men and of the sages of your council, to ordain what shall in this matter seem best to you for the honour and profit of yourself and your kingdom; and whatever shall be thus ordained by the consent and agreement of you and of the great men aforesaid, we readily assent to, and will hold it firm and established.'[2]

In 1354, the King informed the Parliament, through the Lord Chamberlain, that there was great hope of bringing about a peace with France, but that as he would not conclude anything without the assent of the Lords and Commons, he wished to know whether they would agree to peace if it might be had by treaty. To this the Commons

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[1] Parl. Hist. i. 106.
[2] Rot. Parl. ii. 165.

at first replied 'that whatever should be agreeable to the King and the Lords in making of this treaty, would be so to them;' but on being asked again 'If they consented to a treaty of perpetual peace if it might be had?' they all with one voice cried out 'Aye! Aye!'[1]

When at length peace was concluded, in 1360, by the Treaty of Brétigni, Parliament was summoned, and the Treaty submitted to its inspection and formally approved.

In 1368, when David Bruce offered peace with Scotland on condition of being relieved from all homage for his crown to the King of England, the Parliament, on being consulted, advised the King 'not to hearken to any such propositions,' seeing that 'they could not assent to any such peace, upon any account, without a disherison of the King, his heirs, and crown, which they themselves were sworn to preserve.'[2]

Once again, in 1369, the King consulted Parliament as to whether he should renew the war with France, because the conditions of the last treaty had not been observed; and the Parliament advised him to do so.[3]

These examples show the settled practice during the reign of Edward III., and from that time questions of war and peace have been admitted, both by the Sovereigns who have requested, and by the Parliaments which have freely offered, counsel and advice, to be proper subjects of Parliamentary cognisance. 'The exercise of this right,' it has been well observed, 'so far from being a modern invasion of the royal prerogative, is an ancient constitutional usage. It was not, however, until the power of Parliament had prevailed over prerogative that it had the means of enforcing its advice.'[4]

Active control exer-

In many other matters, besides those already enumerated,

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[1] 'Responderent entierement et uniement, Oil, Oil.' Rot. Parl. ii. 262.
[2] Parl. Hist. i. 131.
[3] See Guizot, Hist. du Gouv. Rep. vol. ii.
[4] May, Const. Hist. ii. 86. For instances of Parliament being consulted as to peace or war under Henry VII., James I., and Queen Anne, see Parl. Hist. i. 452; i. 1293; v. 609.

the Commons, under Edward III., exercised an active control over State affairs. The statute of *Provisors* (25 Edw. III.),—which checked the power assumed by the Pope of nominating foreign clerks to fill the Ecclesiastical benefices and dignities of England,—was passed in consequence of 'the grievous complaints of all the Commons of the realm.' In this reign also we meet with the first efforts to repress Electoral abuses. In addition to several petitions that none but knights or reputable esquires might be allowed to serve as county members, it was enacted in 1372 (46 Edw. III.) that no lawyer practising in the King's court, nor sheriff during his shrievalty, should be returned or accepted as knight of the shire. The reason alleged was that many lawyers had procured seats in Parliament for the purpose of putting forward, in the name of the Commons, petitions which only concerned their private clients; and that sheriffs, being common ministers for the people, ought to reside in their official districts to administer right to all.[1]

cised by the Commons over various affairs of State.

The reign of Richard II. is perhaps the most interesting period in the early Constitutional history of England. It was the turning-point in the long struggle between Constitutional liberty and that arbitrary power towards which the loosely-defined prerogatives of our early Kings were always impelling them. During the last two years of his reign Richard succeeded in establishing a practical despotism, and the question between him and his people was narrowed to the simple issue of Absolute Monarchy against Parliamentary government. His deposition and the election of the worthiest member of the Royal house to fill his place marked the final triumph of Constitutional principles, and furnished a precedent of the greatest value when, nearly three hundred years later, the last of the Stuart kings attempted once more to make 'the royal will the only law.' It was in the reign of Richard II., moreover, that the formidable insurrection of 1381 proved the turning-point in

RICHARD II. 1377–1399. *Constitutional importance of his reign.*

[1] Rot. Parl. ii. 310. Though long [practically] obsolete, this statute was not formally repealed till 1871.

the history of villeinage, which thenceforth gradually declined until it died out without any legislative abolition;[1] and in this reign also, we recognise in the theological writings of Wycliffe 'the true epoch of the beginning of the English Reformation.'[2]

Under Richard II. not only did the Commons confirm by frequent exercise the three main rights established under Edward III., that (1) no money could be levied or (2) laws enacted without their assent, and that (3) the administration of government was subject to their inspection and control; but they also secured on an equally firm basis the two derivative rights, which had been asserted for the first time in the late King's reign—namely, (1) the right to examine the public accounts and appropriate the supplies, and (2) the right to impeach the King's Ministers for misconduct.

The three periods of the reign of Richard II.

In taking a rapid survey of the principal Constitutional events of the twenty-two years of Richard's reign, it will be convenient to divide it into three periods. I. From 1377 to the *coup d'état* of 1389, when the King suddenly enquired his age and took the reins of government into his own hands. II. From 1389 to the second *coup d'état* of 1397, when the King seized the Duke of Gloucester and the Earls of Warwick and Arundel (three of the five 'lords appellant') and executed his long dissimulated project of revenge. III. From 1397, when the King began to exercise despotic power, until his deposition in 1399.

First period 1377–1389.

I. 1377–1389. During this period of minority the Com-

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[1] [It is argued by Prof. Kovalevsky, Art. *Villein Tenure in England in 17th Cent.*, in *Arch. Rev.* vol. i., 1888, that a legislative abolition of Villeinage was needed under the Commonwealth, long after *Pigg* v. *Caley*.—ED.]

[2] Shirley, Fasciculi Zizaniorum. [Later writers have denied that there is any such epoch. Indeed, the Hibbert Lecturer for 1883, the Rev. Charles Beard, treating of the Reformation of the 16th century, gave it as the differentiating note of the English portion of that movement, that 'there is no point at which it can be said, Here the old Church ends: here the new begins' (*Hibbert Lect.* 1883, p. 300). It is, of course, true, moreover, and is probably to be taken as Canon Shirley's meaning, that the seed of a Reform movement was sown in the period commonly known as the zenith of the Middle Ages, and that of such seed Wycliffe was the principal sower in England.—ED.]

mons, no longer content with a defensive warfare against the Crown in order to protect the rights already acquired, assumed an aggressive character, and for some years 'the whole executive government was transferred to the two Houses.'[1]

Great increase in power of the Commons.

As soon as the coronation of the boy-king was over, the prelates and barons held a great council, and chose, 'in aid of the chancellor and treasurer,' twelve councillors to act as a quasi-regency. About three months afterwards a Parliament was summoned, and the House of Commons, to which had been returned a large proportion of the knights who sat in the 'Good Parliament' which impeached the Lancastrian Ministry, elected as their speaker Sir Peter de la Mare, now released from prison. The Commons at once proceeded to assert their right to a voice in the government; and at their request, the Lords, in the King's name, appointed a permanent Council of Nine, without whose unanimous consent no business of importance was to be transacted. They also petitioned that, during the King's minority, the Chancellor, Treasurer, Judges, and other high officers, should be made in Parliament; and procured the appointment of two London merchants, William Walworth and John Philypot (the latter of whom is celebrated as the first Englishman who has left behind him the reputation of a financier), as sworn Parliamentary treasurers to receive and disburse the liberal subsidy granted for the French war.[2]

Council of twelve appointed as a quasi-regency by the prelates and barons.

On the meeting of Parliament, a *permanent executive council of nine* appointed at request of the Commons.

Walworth and Philypot made sworn Parliamentary treasurers.

The heavy expenses attending the prosecution of this war,—a legacy which Richard had inherited from his grandfather,—and the usual want of economy incident to a minority, necessitated frequent and urgent appeals to Parliament, and the Commons were always careful to tack conditions to their grants. In the next Parliament they required a clear account in writing of the receipt and expenditure of the last subsidy, a request which was reluct-

Right of Commons to examine public accounts and appropriate the supplies established.

[1] Hallam, Middle Ages, iii. 59.
[2] Rot. Parl. iii. 5–7.

antly granted. In the second year of Richard's reign, the kingdom was in imminent danger of invasion. The Privy Council, not wishing to call a Parliament so soon after the dissolution of the last, convoked a Great Council of peers and other great men, who, finding the absolute necessity of preparation for defence, and that the King wanted money for that purpose, declared that they could not provide a remedy without charging the Commons of the realm, which could not be done without Parliament; but as the necessity was very urgent, all the Lords there present voluntarily lent divers large sums of their own money, as did also 'the good men of London and many other towns, and several persons in the kingdom to whom the King applied with the assent of the said Great Council.' The Lords then strongly advised that a Parliament should be presently summoned, as well for the repayment of their loan as for further supply.[1] This advice was acted upon, and it is significant of the real progress made that, as soon as Parliament met, the King voluntarily, without waiting for a petition, informed the Commons that the treasurers were ready to exhibit the accounts before them; and a committee was appointed to enquire generally into the state of the revenue. A similar committee, but with more extended powers, was appointed in the following year (3 Ric. II.); and the right of the Commons to investigate the accounts and appropriate the supplies was clearly established.[2]

Bold language of the Commons.

In the Parliament which met after the insurrection of the villeins in 1381 (5 Ric. II.), the language of the Commons was characterised by a remarkable boldness. After expressing their conviction that, 'unless the governance of the realm were speedily amended, the realm itself would be utterly lost and ruined for ever, and, as a consequence, our Lord the King, and all the Lords and Commons,

[1] Rot. Parl. (2 Ric. II., Nos. 3, 4, and 5,) iii. 55.

[2] After the reign of Hen. IV. this right fell into disuse. It was revived in 1624 and 1641, and again firmly established as an undisputed principle under Charles II. in 1666.—Hallam, Const. Hist. ii. 356.

which, in His mercy, God forbid,' they assert 'that there are such defects in the said governance, as well about the King's person and in his household (through the outrageous number of his familiars established there) as in his courts of justice; and by grievous oppression in the country through the outrageous multitude of embracers and maintainers of suits, who are, as it were, kings in the country; that neither right nor law is done to any, and the poor Commons are from time to time so pillaged and ruined, partly by the King's purveyors of the household and others, who pay nothing to the same Commons for the victuals and carriage which they take, partly by the subsidies and talliages raised upon them, and besides by the grievous and outrageous oppressions of the servants of the King and other lords, and especially by the aforesaid maintainers of suits, that they are reduced to greater poverty and discomfort than ever they were before.' After making many other bitter complaints against the administration, they emphatically conclude: 'And for God's sake let it not be forgotten that there be put about the person of the King, for and of his council, the most sufficient and discreet lords and knights that man can have or find in the kingdom.' A Commission of Reform was appointed 'to survey and examine in privy council both the state and government of the King's person and of his household, and to suggest proper remedies.' And it was said (continues the entry on the roll) by the Lords in Parliament that, 'as it seemed to them, if amendment of government were to take place throughout the kingdom it should begin by the chief member, which is the King himself, and so from person to person, as well of Holy Church as others, and from place to place, from higher to lower, sparing no person, degree, or place.'[1] The Lords and Commons seem to have vied with each other in boldness and plainness of speech. It was in a great

Bold language of the Lords.

Unanimity of the two Houses.

[1] Rot. Parl. iii. 100.

measure owing to this unanimity between the two Houses, and to the support thus afforded to the Commons in their struggle with the Crown, that the early triumph of Constitutional principles was obtained.[1] It was only when, later on, the baronage had split up into rival factions, that Richard was enabled to get rid of the chiefs of the opposition, and to secure an obsequious Lower House.

As the King grew up towards manhood, he began to exercise the prerogative of appointing his own Ministers, and, unfortunately for himself, developed the same partiality for favourites, which had proved so disastrous to Edward II. This led to the proceedings of the tenth year of this reign, which mark an important epoch in Parliamentary history. The abuses of administration, unchecked by the remonstrances of Parliament, or even by statutory enactments,[2] at length became so grave, that the Commons determined to remove the Ministry and to impeach its chief, the Chancellor, Michael de la Pole, Earl of Suffolk. This prosecution confirmed to the Commons their newly-acquired right of impeaching the Ministers of the Crown.

Proceedings of Parliament in the 10th of Richard II., 1386.

Impeachment of Michael de la Pole.

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[1] 'Few things in our parliamentary history are more remarkable than the way in which the two Houses have for the most part worked together' in times when they 'were really coordinate powers in the state. During the six hundred years that the two Houses have lived side by side, serious disputes between them have been very rare, and those disputes which have happened have generally had to do with matters of form and privilege which were chiefly interesting to members of the two Houses themselves, not with questions which had any great importance for the nation at large.'—Freeman, Growth of Eng. Const. 99. In recent times, however, differences between the two Houses have become more common. 'The Lords,' remarks May, 'opposed themselves to concessions to the Roman Catholics, and to amendments of the Criminal Law, which had been approved by the Commons. For several years neither the Commons nor the people were sufficiently earnest to enforce the adoption of those measures; but when public opinion could no longer be resisted, the Lords avoided a collision with the Commons, by acquiescing in measures of which they still disapproved. Since popular opinion has been more independently expressed by the Commons, the hazard of such collisions has been greatly increased. The Commons, deriving their authority direct from the people, have increased in power; and the influences which formerly tended to bring them into harmony with the Lords have been impaired.'—May, Const. Hist. i. 307.

[2] *Sed quid juvant statuta?* says Walsingham, 'since the King with his privy council is wont to alter or abolish what in Parliament the whole commonalty and the baronage have just enacted.'—Walsing. ii. 48.

In the Parliament which met on the 1st of October, 1386, the Lower House, instead of taking into consideration the question of supply, at once expressed, in the presence of the King, their resolution to impeach the Chancellor. The King then withdrew to Eltham, and when both Houses jointly requested the removal of the Chancellor, the King, with characteristic impetuosity and arrogance, replied 'that he would not for them, or at their instance, remove the meanest scullion from his kitchen.' The Lords and Commons returned a joint answer, refusing to proceed with any business until the King should come back to his Parliament and remove the obnoxious Minister from office.[1] At length Richard was rash enough to threaten to call in the advice of the King of France; a threat which produced the memorable address in answer, in which the Parliament referred to the deposition of Edward II., and plainly intimated to the King that his continued contumacy would produce a similar result.[2] After this Richard yielded; the Chancellor was removed, and his enemy, Arundel, Bishop of Ely, appointed in his stead. In a Bill of Impeachment, divided into seven heads, Suffolk was charged with divers crimes and misdemeanours, and especially with having obtained from the King grants beyond his deserts and contrary to his oath of office, and with having enriched himself by defrauding the Crown. He made a very able defence, and was acquitted on some of the charges: but being found guilty on the rest was

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[1] Knyghton, in Decem Script. col. 2680; Hallam, Midd. Ages. iii. 67.

[2] Their words were: 'We have an ancient statute, and it was not many years ago experimented (it grieves us that we must mention it) that if the King through any evil design or foolish obstinacy, or contempt, or out of a perverse or froward wilfulness, or by any other irregular courses, shall alienate himself from his people, and refuse to govern by the laws, statutes, and laudable ordinances of the realm, with the salutary counsel of the lords and great men of the realm, but will throw himself headlong into wild designs, and wantonly exercise his own singular arbitrary will,—from that time it shall be lawful for his people, by their full and free assent and consent, to depose the King himself from his royal throne, and in his stead to raise up some other of the royal race upon the same.'—Knyghton, col. 2683; Parl. Hist. i. 186. There was, of course, no general 'statute' authorising the deposition of Kings. The reference was to the statute deposing King Edward II.

condemned to forfeit all his grants, and to be committed to prison during the King's pleasure.[1]

Commission of Reform.

Acting on the precedents of the reigns of John, Henry III., and Edward II., and of the third and fifth years of the King's own reign, the Commons now petitioned for the appointment of a Commission of Reform. The King at first resolutely refused to give his assent, and threatened to dissolve Parliament, when the Commons, to terrify him, sent for the statute by which Edward II. had been deposed.[2] At length the King consented, and a Commission, consisting of fourteen persons of the highest eminence, was appointed by statute, with almost unlimited powers for the space of one year.[3]

Richard, who was now in his twentieth year, had no intention of submitting to the loss of power. Before the dissolution of Parliament he had made a verbal protestation that nothing done therein should be in prejudice of his prerogatives;[4] and a few months afterwards, having in the meantime released Suffolk and restored him to favour, he summoned the Judges to Nottingham, and propounded to them the famous set of questions. The Judges gave their answers in writing under seal, (1) that the late statute, ordinance, and commission were derogatory to the King's prerogatives; (2) that all who procured the said

Answers of the Judges to Richard's questions.

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[1] Rot. Parl. iii. 216–220. There is reason to believe that Suffolk was as much 'sinned against as sinning.' As a *parvenu* he was regarded with enmity and jealousy by the old nobility, headed by the King's uncle, the Duke of Gloucester. See Taswell-Langmead's 'Reign of Richard II.: the Stanhope Prize Essay for 1866.'

[2] Rot. Parl. iii. 233.

[3] 'Even impartial men,' Hallam remarks, 'are struck at first sight by a measure that seems to overset the natural balance of our constitution. But it would be unfair to blame either those concerned in this commission, some of whose names at least have been handed down with unquestioned respect, or those high-spirited representatives of the people whose patriot firmness has been hitherto commanding all our sympathy and gratitude, unless we could distinctly pronounce by what gentler means they could restrain the excesses of government. . . . . No voice of his people, until it spoke in thunder, would stop an intoxicated boy in the wasteful career of dissipation. . . . . Nothing less than an extraordinary remedy could preserve the still unstable liberties of England.'—Middle Ages, iii. 69, 70.

[4] Rot. Parl. iii. 224.

statute, ordinance, and commission to be passed, or persuaded or compelled the King to consent to it, were deserving of the punishment of death; (3) that the King, and not the Lords and Commons, had the power to determine the order in which business should be proceeded upon in Parliament;[1] (4) that the King could dissolve Parliament at pleasure; (5) that his Ministers could not be impeached without his consent; (6) that any member of Parliament contravening articles 3, 4, and 5, should be punished as a traitor, and especially he who had moved that the statute deposing Edward II. should be sent for, and he who had brought it in; and (7) that the judgment against the Earl of Suffolk was altogether erroneous, and might be revoked.[2] All the Judges, except one, subsequently protested that these answers had been extorted by threats. Whatever may have been the motive which dictated them, they were undoubtedly both servile and sanguinary, unconstitutional for the most part, even as the Constitution was then understood, and utterly inconsistent with the continued existence and future development of Parliamentary liberty.

Plot of the King against Parliament[1]

The King had been secretly maturing a plot for working out his revenge through the medium of a corrupt bench of Judges and a packed House of Commons. He had intended, after securing a Parliament favourable to his cause,[3] to seize the most obnoxious members of the Opposition, and send them for trial before the Judges who had already given their opinion on the question of law. The discovery of this plot led to the subsequent revolutionary proceedings of the five 'Lords Appellant' (Gloucester, Derby, Notting-

Its discovery followed by revolutionary proceedings of the *Lords Appellant.*

[1] This was directed against the contention of the Commons, insisted upo in the case of Suffolk's dismissal, that redress of grievances ought to preced supply.

[2] Rot. Parl. iii. 233; and see [Hallam] Middle Ages, iii. 72.

[3] He sent for the Sheriffs and required them to permit no knight or burgess to be elected without the approbation of the King and his Council. The Sheriffs refused, asserting that the Commons would maintain their ancient privilege of electing their own representatives.—Vita Ricardi, p. 85; Wals. ii. 161.

ham, Warwick, and Arundel) in the Parliament, which with equal propriety has been termed the 'Wonder-working' and the 'Merciless.' Deprived, by death or exile, of all his favourites, Richard remained for nearly a year subservient to the Duke of Gloucester's party; until, taking advantage of the growing disunion in their ranks, and of a reaction in public opinion, he suddenly (in 1389) snatched the helm of Government from their grasp.

Merciless Parliament.

Insurrection of the Villeins, 1381.

The formidable insurrection of the villeins in 1381 had very forcibly called the attention of the knights and burgesses, who had hitherto been intent upon the maintenance of their own political liberties, to the growing feeling of discontent among the agricultural labourers. Forming probably a majority of the whole nation, they were not merely destitute of political privileges, but harassed by vexatious restrictions on the freedom of their labour, and in many cases were in a state of personal bondage.

History of Villeinage.

Depression of the Ceorls prior to the Conquest.

Depression continued after the Conquest:

For a long time prior to the Conquest, the condition of a large number of the ceorls had been gradually becoming more and more depressed. Although they were all freemen, an increasing number had lost the privilege of commending themselves to whatever *hlaford* they pleased, and were unable to quit the soil which they cultivated for their own and their lord's benefit. There is no evidence that the Normans made any change in the legal position of this class of the people. On the contrary, the customary rights of the agricultural tenants—the main body of the people—are expressly confirmed in the laws attributed to William the Conqueror: *Coloni et terrarum exercitores non vexentur ultra debitum et statutum, nec licet dominis removere colonos a terris dummodo debita servitia persolvant.*[1] But the general status of all agricultural tenants would naturally be lowered under the harsh rule of their new military masters. The multitude of smaller

[1] Thorpe, Ang.-Sax. Laws, 481, c. 1; Leg. Gul. Conq. c. 29.

or larger 'manors' with which the whole of England appears covered in the first century after the Conquest, were not indeed of Norman origin, though called by a Norman name; but the strict application of the Feudal system to all kinds of land, which was a result of the Conquest, must have tended very much to throw the small landed proprietors under manorial lordships.[1] The ceorl, who had previously been at liberty to go where he willed, would now tend to the position of one bound to the soil; and the service which was formerly certain in amount would now in many cases be exacted at the will of the lord. But the ceorl did not on that account cease to be a freeman. Ceorls who had land for the most part retained it, as *libere tenentes* or *socmanni*, rendering, by way of rent, fixed agricultural services, exclusive of, or in conjunction with a money payment. The rest, under the generic term *villani*, were the agricultural labourers whose wages were paid in land carved out of the demesne which they cultivated for the lord. But amongst the villeins there were various grades, of which the higher, possessing larger holdings, and performing the more honourable services of agriculture, probably approached very near to the *socmanni;* while the lower, such as the *bordarii*, *cottarii*, and *cotseti*, with but scanty allotments, and rendering a baser and less skilled labour, would be liable in many cases to become gradually confounded with the *servi*, who, after the date of Domesday, disappear as a class distinct from the *villani*.[2]

as an indirect resul of the Feudal system.

'Villein' a generic term for the agricultural labourer, both free and servile.

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[1] In Bracton (lib. i. c. 11, fol. 7) we read: Fuerunt etiam in Conquestu liberi homines qui libere tenuerunt tenementa sua per libera servitia vel per liberas consuetudines, et cum per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tenenda *in villenagio*, faciendo inde opera servilia, sed certa et nominata: et nihilominus *liberi*, quia *licet faciant opera servilia* non faciunt ea ratione personarum sed ratione tenementorum.' This is borne out by Domesday, ii. 315; 'Duo taini *tenuere*, ibi *sunt* duo villani.' [It seems to be rather a probable inference than a certainty, that the *villani* of Domesday, in the case cited, were the same men who had been *taini* T. R. E.—Ed.]

[2] [Digby, *Hist. Law of Real Property*, pp. 128-9, speaking of the period from Hen. II. to Hen. III., shows how the practice of allowing villeins to continue to occupy their lands without interruption, and even to alienate and

Status of the Villeins.

Glanvill, writing in the reign of Henry II., speaks of the *nativi* as being absolutely dependent upon their lords' will, and so destitute of any kind of property that they were legally incapable of purchasing their own redemption from villeinage.[1] Here we may probably trace the influence of the Roman law as to slavery[2] in exaggerating the servile aspect of villeinage in the eyes of the mediæval lawyers. Applied to the lower grade of villeins—the representatives of the ancient theows, the *servi* of Domesday—this description is doubtless quite accurate; but with regard to the whole class of agricultural labourers, generically known as villeins, it is inconsistent with what we learn from other historic sources. That villeins had property, notwithstanding the general statements of Bracton and other legal writers to the contrary, seems to be clearly proved. Thus, in the chronicle of Simeon of Durham, we read (*s. a.* 1096): *Comites, barones, vicecomites suos milites et villanos spoliaverunt, et regi non modicam summam auri et argenti detulerunt.*[3] So in the 'Dialogus de Scaccario,' among possible debtors to the King are enumerated *miles, vel liber alius, vel ascriptitius.*[4] In Magna Charta (sec. 20),

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transmit their interests to their descendants, gave a new sense to the word *villenagium*, which by that time had come to mean (1) the nature of a villein's interest in land, (2) the kind of interest which a villein has, though the land may be held by a freeman. At this period (Hen II.—Hen. III.), the villein, or freeman holding in villeinage (except when protected by an express covenant under seal entered into by the lord), held strictly at the will of the lord. See further Bracton, lib. iv. c. 28, fol. 208, cited by Digby, *ubi supra.* 'The distinction between bordars and cottars,' says Morgan, *Engl. under the Normans*, p. 64, 'is by no means clear . . their name [*bordarii*] had been brought into England by the Normans, and it disappears at the end of the 12th century. In Normandy they were principally employed in domestic labour.'—ED.]

[1] Omnia catella cujuslibet *nativi* ita intelliguntur esse in potestate domini sui, quod propriis denariis suis versus dominum suum *a villenagio* se redimere non poterit.—Glanvill, lib. v. c. 5; see also Dialog. de Scac. lib. i. c. 11; lib. ii. c. 14.

[2] Ipse enim servus, qui in potestate alterius est, nihil suum habere potest. *Inst.* II. ix. 3.

[3] Sim. Dunelm. [ii. 227. Rolls Ser.—ED.]

[4] Dial. de Scac. lib. ii. c. 13. The 'Dialogus de Scaccario' was written by Richard, Bishop of London, Treasurer of the Exchequer under Henry II., son of Nigel, Bishop of Ely, his predecessor in the office, and great-nephew of Bishop Roger of Salisbury, the original organiser of the administration of that court. It contains 'an extraordinary mass of information on every important

the 'wainage' (implements of tillage) of a villein is specially excepted from liability to seizure for a fine due to the King. Henry III., in a writ issued in 1225 for the collection of a 'fifteenth,' excepts from assessment the arms which a villein was sworn to keep for service in the local militia, as well as his household utensils, and such of his provisions, hay, and provender as were not for sale.[1] In 1232 a 'fortieth' is declared to have been granted by the 'archbishops, bishops, abbots, priors, clergy holding lay fees, earls, barons, freeholders, and *villeins*.'[2] Five years later a 'thirtieth' is declared to be granted by the freeholders, *pro se et suis villanis*, and a distinction is drawn between the villeins, and the poor having less than forty pence *in bonis*, who are to pay nothing.[3]

Change in signification of the word 'villein.'

It seems clear that the word *villanus* had undergone a change of meaning between the times when Domesday was compiled and when Bracton wrote under Henry III. In Domesday the men who, though performing base services, were still free, are carefully distinguished from the *servi*. But both the *villani* and *servi* received, the one their wages, the other their means of subsistence, in land, which, however it might differ in quantity, was still held by the same villein tenure, and for which they rendered services the same in kind though differing in extent. From the status of the *servi*—the lowest species of tenants-in-villeinage—the generic term 'villein' seems gradually to have acquired a lower sense and meaning, and came at length to denote the condition of personal servitude.[4] The great mass of the villeins, however, were still freemen, though subject to services of a base or servile character. The word *servus* disappeared as the name of

The majority of villeins not slaves.

point in the development of constitutional principles, before the Great Charter.' —See Stubbs, Select Chart. 160.

[1] Rymer, i. 177.

[2] Matt. Paris, 380; Select Chart. 351.

[3] Rymer, i. 232.

[4] 'It may be doubted whether the word *villani* had during the twelfth century fully acquired the meaning of servitude which was attached to it by the later lawyers.'—Stubbs, Const. Hist. i. 431.

The *servi* of Domesday represented by the later *nativi.*

a class, but villeins, in the lower sense of the term, are generally specifically described as *nativi*—villeins by birth, not merely by tenure—or by the addition of the word *servus* after *villanus.* The double signification of the word is evident from the returns in the Hundred Rolls (*tempore* Edw. I.), where, in certain cases, it is specially stated, *villani sunt servi*, or *nativi*;[1] while, on the other hand, in the decisions of the *Curia Regis* of the same period, the word *villanus* is used to designate the state of personal serfdom.[2] We are expressly told by Bracton (*temp.* Hen. III.), that a freeman might hold tenements in

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[1] Rot. Hund. 324; Tenentes in villenagio sunt *nativi* de sanguine suo; 327, tenentes in villenagio sunt ita *servi et nativi* quod non possunt maritare filias suas sine licentia domini; 329, sunt *servi et villani* de sanguine suo; 822, De *Nativis*, Robertus Noreyes tenet unam virgatam in *puro* villenagio et reddit per annum ii s. ii denar' et debet operari per *totum* annum et talliari, et redimet pueros suos ad voluntatem domini.

[*Nativi* and *villani* were sometimes sold or granted away, at least to Holy Church, but whether they were in consequence dislodged from their homes, and transplanted to lands belonging to the Church or Convent to which they were granted, is not clear from the charters cited. An interesting correspondence, with extracts by Sir William Parker of Melford, Bart., from Norfolk charters of the 12th and 13th centuries, is printed in *The East Anglian*, New Series, Ipswich, 1885, Pt. II., pp. 27–9. The Rev. C. H. Evelyn White, M.A., the editor of the *East Anglian*, in a letter printed with the above correspondence, suggests that Sir William Parker's cases of sales or grants of *villani* 'may be found to be somewhat exceptional,' apparently as grants to religious houses. Sir William cites a sale, *circa* A.D. 1200, by Walter de Risby, to the Sacrist of St. Edmund's Abbey [Bury St. Edmund's] of his villein, Walter Fitz-Aylward, with all his progeny. It would have been well to have given the descriptive epithet in the original. It seems to have been *villanus*. Again, in a deed simply described as of the 13th century, Geoffrey Scallarius, son of Hugo, gives to God and the Church of the Holy Trinity of London, and to Richard, the Prior there, John, son of Robert de Wydehalle, his native born serf, with all his progeny now living, or which may be born to him, for ever, with all their chattels, the Prior giving six marks in money. In 1182, Thomas de Barewe, at the request of Sampson, Abbot of St. Edmund's, gives Seward de Barewe, son of Aluric le-fader, with all his chattels and progeny, in pure and perpetual charity, to God and to the Church of the Convent of St. Edmund's. It may be questioned whether some of these nominal sales or gifts were not practically manumissions. The language of some of the very interesting manumissions cited by the late Mr. Haddan, from the Book of St. Chad, Leofric's Missal, and other early texts, seems to bear a certain likeness to that of these Norfolk gifts to God and Holy Church. Cf. Haddan and Stubbs, *Councils and Eccl. Doc.* i. 206 *seq.*, and cf. note, *post.*—ED.]

[2] Placit. Abbrev. p. 25: Et dicunt quod *villanus* est quia ipse debet arare et metere et auxilium dare per consuetudinem et quod non potest sine licentia filiam suam maritare. *Id.* 161: Homines cognoverunt se esse *villanos* et consuetudinarios predicti A. operando quidquid ipse precepit et dando merchetam pro filiabus suis maritandis.

villeinage, in which case his personal liberty existed along with the burthens of territorial servitude.[1] He distinguishes two kinds of villeinage, socage and pure. The *villani socmanni* were bound to fixed services, but while they could not, so long as they performed the service due, be removed from their land against their will, they could at any time voluntarily leave it. They had no power, however, any more than the tenant in pure villeinage, to confer on another any right or interest in the land occupied; they could only by a bargain with the lord surrender it to him or his steward, so that it might be let out afresh to the person in whose favour it had been relinquished.[2] The 'pure' villein, on the contrary, according to Bracton, might be subjected to unlimited services and burthens, *nec scire debeat sero quid facere debeat in crastino, . . . talliari . . . potest . . . ad plus vel minus.*[3] He had not the smallest right in the land which he cultivated, and was in the strongest sense of the word a predial serf. The *villani socmanni* seem to have consisted chiefly of those who were 'tenants of the King's demesnes,' but there is very strong evidence that at the beginning of the thirteenth century the majority of the agricultural tenants of ordinary manors, though subject to many vexatious conditions, were freemen, and that only those specially denominated *nativi* were 'pure' villeins—that is, in actual serfdom or slavery.[4]

Villein-sokemen and pure villeins.

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[1] Bracton, l. ii. c. 8; iv. c. 28; see also Placit. Abbrev. 29 Edw. III. p. 243: Tenura in villenagio non facit liberum hominem villanum.

[2] Bracton, ii. 8.

[3] [iv. 28. Cf. Digby, *Hist. Law of Real Prop.* p. 129.—ED.]

[4] See especially 'Domesday of St. Paul's,' of the year 1222, edited for the Camden Society by the late Archdeacon Hale. 'Tenants of four ranks or orders,' remarks the Archdeacon, 'occupied the manors of St. Paul's at the time of the Exchequer (Domesday) Survey—Villani, Bordarii, Cotarii, Servi. . . In the Domesday of 1222 only one of these distinctive names is preserved—that of the Cotarii; but the other three classes appear to be represented by the Tenentes ['libere,' 'antiquum tenementum,' 'de dominico,' 'per vilenagium,' &c.], the Operarii [persons holding land 'ad operationem,' *i.e.*, exclusively by the tenancy of labour], and the Nativi. . . . Though there were 'Servi' on every manor in the earlier times, no distinct mention is made of this class on any of the manors in 1222, though probably the persons described as 'nativi a principio' . . belonged to it. . . The ordinary prædial services required

Difference between the ancient manor and the modern landed estate.

It is important to bear in mind that manorial property differed in many respects from the modern landed estate. 'It was not a breadth of land, which the lord might cultivate or not as he pleased, suffer it to be inhabited, or reduce it to solitude and waste; but it was a dominion or empire, within which the lord was superior over subjects of different ranks, *his power over them not being absolute, but limited by law and custom.* . . The demesne, the assised,[1] and the waste lands were his; but the usufruct of the assised land belonged, on conditions, to the tenants, and the waste lands were not so entirely his that he could exclude the tenants from the use of them.'[2]

Tendency in the manor towards certainty of tenure and services.

The natural tendency of the Customary law by which each manor was regulated was towards certainty; certainty of services, certainty of tenure. Accordingly we find in the Hundred Rolls and other land registers of the thirteenth century, exact specifications of the services due from the various denominations of tenants; and even those villeins who are entered as liable to be talliaged at the will of the lord, have their agricultural services accurately determined both in kind and extent. There was another circumstance which favourably affected the condition of the agricultural population. A money economy, as opposed to the Mediæval barter in kind, was established in England at a much earlier period, and far more extensively than in the great

Early establishment of a money economy in England.

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from the Tenentes or Villani were not required to be performed in person; and whether in the manor or without it the Villanus was not in legal language 'sub potestate domini.' Not so the Nativus; wherever he was dwelling, he was his lord's property, and must return to his manor or be pursued as a fugitive slave. (Bracton, l. 1. c. 6, 10.) . . Under the manorial system all the tenants performed prædial services, but the higher was the rank of the tenant the fewer services were due.'—Introd. pp. xxi., xxiii., xxvi. 'I suspect,' says Hallam, 'that we go a great deal too far in setting down the descendants of these ceorls—that is, the whole Anglo-Saxon population, except thanes and burgesses, as almost universally to be accounted such villeins as we read of in our law-books, or in concluding that the cultivators of the land, even in the 13th century, were wholly, or at least generally, servile. It is not only evident that small freeholders were always numerous, but we are perhaps greatly deceived in fancying that the occupiers of villein tenements were usually villeins.' —Middle Ages, iii. 261. [Cf. *Burton Chart.*, *Derb. Arch. S.*, 1885, 153.—ED.]

[1] *Assised* lands = parts of the demesne granted out to tenants subsequently to the original formation of the manor.

[2] Hale, Domesday of St. Paul's, Introduct. xxxii.-iii.

inland countries of the European continent.[1] The lords of manors found it more profitable and convenient to receive money payments in lieu of the ancient predial services, and the tenants were very willing by such payments to relieve themselves from the burthen of personal performance of the services. This change was gradually carried out between the end of the thirteenth and the middle of the fifteenth centuries. In this way a numerous class of free labourers arose, and the lords of manors passed into the condition of the landlord of modern times, who must hire, but cannot command, labour.

Rise of the class of free labourers.

The first to profit by this change were the higher classes of villeins, who gradually, by force of custom, developed from mere tenants-at-will into customary freeholders and copyholders, with inheritable estates in their lands subject to fixed services.[2] The lowest class, the *nativi*, still continued for a long time in a state of transition, their birth state of slavery presenting an almost insuperable bar to emancipation otherwise than by the free will of their lords, so long as they continued on the manors to which they were attached. Their ultimate emancipation was due partly to voluntary manumission, which the clergy persistently urged upon the lords, partly to the humane presumptions of the law in favour of liberty, but mainly to the efforts of the slaves themselves, who being in bondage only relatively to their masters, but free as to all the world

Transmutation of Villein tenure into Copyhold.

Gradual emancipation of the *nativi*.

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[1] Nasse, Agricultural Community of the Middle Ages (translated by Ouvry), p. 67.

[2] The remarkable transmutation of villein-tenure into copyhold began at least as early as the time of Henry III., and was completely carried out before the reign of Edward IV., when the Judges permitted the copyholder to bring an action of trespass against his lord for dispossession.

[Digby, *Hist. Law of Real Property*, p. 245, sets out the part which Custom had in protecting the tenant in villeinage, and aiding his upward move. For 'Custom,' as Digby says, 'fixed the rights of the lord, the amount of service to be rendered to him, the heriots upon the death of the tenant, the fine on the admission of a new tenant, the mode of succession and devolution of the lands to the tenant's eldest or youngest son, or to all the sons alike, and so forth.' And these customs, he remarks, were 'deeply rooted in the habits of the people,' so much so, that 'from Bracton to Edw. IV. we hear this class of tenants (*i.e.* in villeinage) spoken of as if they had a recognised and legally protected interest in lands.'—ED.]

besides, practically escaped from servitude by flight to distant counties, or sought the shelter of some city or borough within whose hospitable walls unmolested residence for a year and a day rendered them for ever freemen.

Statutes regulating labour.

The dreadful pestilence of 1348, by greatly reducing the number of the new class of hired labourers, nearly doubled the value of their labour,—to the great loss of those landed proprietors who had commuted the predial services of their tenants. The landlords, with an utter disregard of the rights of the labourers, had recourse to the statute of 1349, and to a series of similar statutes between that year and 1368, by which every able-bodied man, not living of his own nor by any trade, was compelled to hire himself to any master who should demand his services, at such wages as were paid three years previously, or for some time preceding. These statutes, whilst failing in the object which they had in view, as appears by the frequent complaints of the Commons that they were not kept, greatly increased the general discontent of the peasantry.[1] In a great many manors at this period the ancient services still remained due, but the villeins, lured by the prospect of high wages, impatient of the burthens of predial service, and animated by the general Democratic spirit which the progress in knowledge and refinement had excited throughout Europe,

Statute of Labourers, 23 *Edw. III.* [1349.]

Discontent of the peasantry.

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[1] The legislation respecting the whole class of free labourers, from the early part of the 14th century till the end of the 15th, was selfish and unjust throughout. 'The labourer,' remarks Mr. Pashley, 'was never to better his condition. Imprisonment and branding on the forehead with a hot iron was the lot of the fugitive servant, although he had never *consented* to enter into the service of his lord, and had been compelled to do so for wages less than he was justly entitled to receive. Even "artificers and people of mysteries" were liable to be *pressed* by the lord to get in his harvest (13 Rich. II. c. 3), and if a poor labourer's unmarried daughter of eighteen or twenty years of age, had been "required to serve" any master, she must, under the statutory provisions, either have gone into the service, or have been committed to gaol for refusing. No child could be apprenticed to any useful craft, unless its parents were owners of land yielding a certain amount of yearly rent, and the compulsory service, such as has been described, paid for by a rate of wages below the just level, would be a perpetual cause why servants should have endeavoured to free themselves from their bondage, and why the "valiant beggars" of whom we read, should have so greatly increased throughout the country.'—Pauperism and the Poor Laws, p. 163.

began to confederate for the purpose of resisting their lords. A statute of the first year of Richard II., passed 'at the grievous complaint of the Lords and Commons of the Realm, as well men of Holy Church, as other,' for the punishment of recalcitrant villeins, recites that 'villeins and tenants of land in villeinage who owe services and customs to their lords, had of late withdrawn their customs and services from them, by comfort and procurement of others their counsellors, maintainers, and abettors, who had taken hire and profit of the said villeins and land tenants; and under colour of exemplifications out of Domesday Book of the manors and villes in which they dwelt, and by wrong interpretation of those exemplifications, claimed to be quit and discharged of all manner of service, either of their body or of their lands, and would suffer no distress or other course of justice to be taken against them; and did menace the servants of their lords with peril to life and limb, and what is more, did gather together in great routs, and bind themselves mutually by such confederacy that each one should aid the other to resist their lords with the strong hand.'[1] It has been suggested, with much probability, that about this period the lords of manors who had commuted the services of their tenants, attempted to reimpose the old predial burthens,[2] and that this, in conjunction with the irritating poll-tax of twelve pence a head exacted from rich and poor alike,[3] was the exciting cause of the formidable insurrection of 1381, in which all classes of the villeins—free and slave—made common cause. The actual demands of the insurgents were evidently framed so as to include the grievances of the free agricultural labourers as

Demands of the insurgent villeins in 1381.

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[1] 1 Ric. II. c. 6 (Stat. Realm, ii. 2). [Cf. *Burton Chart. J. D. A. S.* 135.—Ed.]

[2] Thorold Rogers, History of Agriculture and Prices in England, A.D. 1259–1400 [i. 81–3.—Ed.]

[3] It was ordered, however, that the richer should aid the poorer, and that individual contributions might range from 20*s.* down to 4*d.* : que a la somme totale accomptez en chescune Ville les suffisantz selonc leur afferant eident les meindres; Issint que les pluis suffisantz ne paient oultre la somme de lx Grotes pur lui et pur sa femme, et nule persone meins q'un Grot pur lui et pur sa femme. Rot. Parl. iii. 90. But this left much scope for oppression on the part of the collectors of the tax.

well as of the *nativi*. They comprised, in addition to a general pardon, (1) the abolition of slavery; (2) a fixed rent of fourpence the acre on lands instead of the predial services due by tenure in villeinage; and (3) freedom of commerce in market towns without toll or impost.

Reaction after the Insurrection of 1381.

The immediate effect of the violence of the Democratic party was to create a reaction of stern repression. The general charter of manumission (which was clearly illegal) extorted from Richard by the rioters, was annulled by Royal proclamation[1] and by statute, both Houses of Parliament unanimously refusing to accept the King's offer to agree to the entire abolition of the state of bondage, and affirming, in the exaggerated language of panic, that they would never consent to such a measure even 'to save themselves from perishing altogether in one day.'[2] But the Insurrection was really the turning point in the history of predial servitude. When the panic had passed away, the process of decay, which had begun in the previous century, proceeded at an accelerated pace, and was consummated by the Wars of the Roses, which weakened the authority of the lords over all classes of their tenants, and enabled the latter, in the midst of the political confusion, to make good their independence. In a few exceptional instances the state of servitude lingered on till the commencement of the seventeenth century, when it became extinct without any legislative abolition.[3]

Decay and ultimate extinction of villeinage.

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[1] Rymer, iv. 126.

[2] 'Ne jamais ne ferroient pur vivre et murrir touz en un jour.'—Rot. Parl. iii. 100.

[3] The last case in which villeinage was pleaded was that of *Figg* v. *Caley* (Noy, R. 27), in the 15th of James I. The plaintiff, Pigg, sued the defendant in trespass for taking his horse. The defendant pleaded that he was seised of the manor of D., to which Pigg was a villein regardant, and that defendant and those seised of the said manor had been seised of the plaintiff and his ancestors. The plaintiff replied that he was free, and this issue was found in his favour. Since the extinction of villeinage, no form of slavery in England has been recognised by law. But in the Colonies it was legalised by statutes 10 Will. III. c. 26, 5 Geo. II. c. 7, and 32 Geo. II. c. 31; and the status of a colonial slave when in England long continued doubtful. As early as Queen Anne's reign, Lord Chief Justice Holt expressed an opinion that 'as soon as a negro comes into England he becomes free,' and Mr. Justice Powell also declared that, 'the law takes no notice of a negro' (2 Salk. 666);

Second period: 1389–1397.

Apparent harmony between Richard and his Parliament.

II. 1389—1397. During this period of nearly eight years, comparative harmony subsisted between Richard and his Parliament. The events of the earlier part of his reign had taught the King discretion, or possibly dissimulation; and the return of John of Gaunt, who had been absent during the late revolutionary proceedings prosecuting his claim to the throne of Castile, served to keep his brother of Gloucester in check, and exercised a mitigating influence over the excited passions of all parties. A revulsion of popular feeling, somewhat similar to that which in later times brought about the restoration of Charles II., seems to have set in; and the Parliament during this period proved complacent and even obsequious. The popular leaders among the nobles were moreover divided by personal jealousies, and thus the Commons lacked the powerful support which they had hitherto received. The series of truces with France obviated the necessity for oppressive taxation. The Parliament refrained from interfering with the King's household expenses, and repealed the statute by which Edward II. had been deposed;[1] but they continued the practice of making conditional grants, to be levied only in case of an expedition against the enemy, and on account of the non-fulfilment of this condition, several subsidies were remitted

Division among the leading nobles.

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but the first express adjudication on the subject was not given till 1772, when Lord Mansfield, in the celebrated case of the negro Sommersett, pronounced the decision of the Court of King's Bench that slavery in England is illegal, and that the negro must be set free. [Long before Holt and Mansfield, however, the distinguished Civilian, Sir Leoline Jenkins, had, in his Charge at an Admiralty Sessions at the Old Bailey, in 1674–5, pronounced *obiter* that there was 'no such thing as a slave' in England. See *Law Magazine and Review*, No. cclvii., for Aug. 1885, where the Charge is edited with notes by Sir Sherston Baker, Bart. The passage cited is on p. 424 of the *Review*.—Ed.] (State Trials, xx. i.; Broom, Const. Law) [Denman's ed., pp. 59–115.—Ed.] Four years later, in the case of the negro Knight, the Court of Session in Scotland declared the unlawfulness of negro-slavery in that country (Morison, Dict. of Decisions, iii. 14545). It was not however till 1799 that the colliers and salters of Scotland, who, by force of a comparatively modern custom which had grown into recognition since the extinction of the ancient feudal villeinage, had been reduced to a state of serfdom, were declared absolutely free by Statute 39 Geo. III. c. 56. Seven years later the Slave Trade was prohibited; and on the 1st of August, 1834, Colonial slavery itself was abolished.

[1] Rot. Parl. iii. 286.

by proclamation. The King on his side behaved with unusual courtesy. In 1390, he ordered the Chancellor, Treasurer, and other members of his Council, to resign their offices in Parliament, and submit themselves to its judgment in case any charge should be brought against them. After a day's deliberation the Commons declared, in full Parliament, that nothing amiss had been found in the conduct of the Ministers, who were consequently restored to their former positions; the King protesting that his complaisance on this occasion was not to be drawn into a precedent.[1]

Prosecution of Haxey.

As soon however as Richard, having secured an alliance with the Royal family of France, and perceiving the disunion which existed among his principal nobility, fancied himself secure upon his throne, he ventured once more to indulge his natural arbitrary and tyrannical disposition. His first 'open defiance of Parliament and declaration of arbitrary power' was the prosecution in 1397 of [Rev.] Thomas Haxey, a priest, and probably a representative of the clergy in the Lower House,[2] who had introduced a Bill complaining of maladministration and of the excessive charges of the King's household. Its specific allegations were: (1) That the statute requiring sheriffs and escheators to be persons of sufficient lands and rent, and that they should not retain office for more than a year, was not kept or regarded. (2) In the Scottish March, great oppressions and outrages were inflicted by the Scots, contrary to the truces between the two kingdoms, and to the destruction of the March and of the King's lieges: wherefore it was prayed that a remedy might be ordained by the good discretion of the King and Lords. (3) That retainers ('vadletz

[Haxey's Bill.]

[1] Rot. Parl. iii. 258.

[2] His name does not appear in any return of the elections to this Parliament, but he was in all probability a proctor of the clergy attending Parliament under the *praemunientes* clause. He was a canon of Southwell and afterwards of York, where he was Treasurer in 1418, and his tomb still remains in the Minster.—See Raine's Fabric Rolls of York Minster [Surtees Soc.], pp. 203—206 [where an interesting account is given of Haxey], and Stubbs, Const. Hist. ii. 492. [In text, 'Rev.' has been substituted for 'Sir,' which seemed misleading.—ED.]

appellez yomen') of the Lords (not being familiars and menials with the Lords) wore liveries, contrary to the statute passed with the object of preventing the maintenance and duress, by colour of such liveries, done in the country, to the oppression of the people and the disturbance of the execution of the law. Wherefore the Commons prayed that the said statute be kept, and a certain punishment be ordained, by advice of the Lords, for those who failed to observe it. (4) That the great and excessive charge of the King's household should be amended and diminished: to wit, of the multitude of bishops, who have lordships, and with their retinue are supported by the King; and also of many ladies and their attendants who dwell in the palace of the King and at his cost.[1] Richard sent for the Lords, who were considering the Bill, declared it to be an invasion of his prerogative, and ordered the Duke of Lancaster to demand from the Commons the name of the person who had introduced it. This request the Commons, with many humble apologies, complied with; and being intimidated by the King, and unsupported in this instance by the nobility, they remained passive while the Lords and the King passed an ordinance, in the nature of an *ex post facto* law, declaring it treason for any person to move Parliament to remedy anything appertaining to the King's person, rule, or royalty. Two days after (Feb. 7), under this law, Haxey was condemned, on his own confession, to suffer the punishment of a traitor.[2]

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[1] Rot. Parl. iii. 340. In the recital of Haxey's Bill contained in the pardon ultimately granted to him (Rot. Pat. 20 Ric. II. in Rot. Parl. iii. 407), he is also made to complain of the imposition by the Pope of a tax of 4*d.* in the pound on the clergy of the province of Canterbury: 'Et auxi [plese a les Communes d'Engleterre en cest present Parlement] de considerer, coment lui Seint Piere fist imposicion du clergie de la diocise de Caunterbirs de quatre deniers de la livere l'an darrein, quel imposicion estoit expressement encauntre la Regalie nostre Seigneur le Roi, a grand damage et destruction de la Clergie et de la Comun' d'Engleterre, et adnullement de les droitz de la Corone nostre dit Seigneur le Roy, et ent ordener due remede en salvacion nostre dit Seigneur le Roy, et son Roaume, pur Dieu, et en oevre de charitee.'

[2] Rot. Parl. iii. 339, 341, 407, 408. As a clerk, his life was spared at the intercession of the Bishops; and a full pardon was granted him on the 27th of May.

This violent proceeding was undoubtedly (to quote the words used in Henry IV.'s first Parliament, when the Judgment was reversed in both Houses), 'en anientisement des custumes de lez communes, encontre droit et la curse quel avoit este devant en Parlement.'[1] Since the 50th of Edward III., the right of the Commons to a control over public expenditure, as well as to freedom of speech in Parliament, had been established by its frequent and effective exercise.

Third period: 1397–1399. Despotic measures of Richard.

Servility of Parliament.

III. 1397—1399. The prosecution of Haxey was quickly followed up by the execution of the King's long-cherished project of revenge, the first step towards which was the seizure of the Duke of Gloucester and the Earls of Warwick and Arundel (three out of the five 'Lords Appellant'). The conduct of the Parliament was so servile, as to render probable the statement of the anonymous monk of Evesham in his life of Richard II.,[2] that it was surrounded by the King's troops, and thus coerced into compliance with his wishes. Notwithstanding the general and special pardons formerly granted, the Duke of Gloucester, who had been sent to Calais and there murdered, was attainted after his death, the Earl of Arundel was beheaded, his brother, the Archbishop of Canterbury, deposed and banished, and the Lords Warwick and Cobham sent beyond sea. In the short Parliament of Shrewsbury, which met on the 28th of January, 1398, and sat only to the end of the month, the proceedings of the Parliaments of the tenth and eleventh years of the reign were annulled. The answers of the Judges to the questions put by the King at Nottingham, which had been punished by death and exile, were declared to be just and legal.[3] An attempt was also made to bind future Parliaments by enacting that

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[1] Rot. Parl. iii. 438, 480.

[2] Vita Ricardi (ed. Hearne), 133. There is reason to believe that this Parliament was also packed. Otterbourne (p. 191) says that the knights returned were elected 'non per communitatem, ut mos exigit, sed per regiam voluntatem.'

[3] See Hallam, Middle Ages, iii. 77; and for a detailed account, Stubbs, Const. Hist. ii. 497.

every judgment, statute, or ordinance, made in the present Parliament, should in all time to come have the full force of statutes, and that any man who should attempt to repeal or overturn them should be adjudged, and have execution as, a traitor to the King and the Realm.[1] The Commons then set the dangerous precedent of granting the King a tax (upon wool and hides) for the term of his life.[2] The concluding act of the session proved the most disastrous of all to Constitutional liberty. It had been the custom to dismiss the members as soon as ever public business would permit, and to appoint a Committee to hear and determine such petitions as had not been answered during the sitting of Parliament. Accordingly a Committee of twelve peers and six commoners was appointed to sit after the dissolution of Parliament. It is evident that no further power was intended by Parliament to be delegated to these eighteen Commissioners than such as had been conferred upon previous occasions. But the words of their appointment were of somewhat indefinite scope, under colour of which the Committee usurped the complete rights of the Legislature, and exercised all the powers and functions of a full Parliament.[3]

Grant to Richard of a revenue for life.

Appointment of eighteen Commissioners:

who usurp the powers of Parliament.

The obscure quarrel between the Dukes of Hereford and Norfolk (the two remaining 'Lords Appellant') gave Richard an excuse for banishing them both. The King was now triumphant over all his enemies. The grant of a revenue for life relieved him from the necessity of summoning a Parliament. The Committee of Eighteen issued

Quarrel and banishment of Hereford and Norfolk.

Triumph of the King.

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[1] Rot. Parl. iii. 350–352.

[2] Rot. Parl. iii. 368.

[3] Rot. Parl. iii. 369, 372, 385. Among the charges brought against Richard prior to his deposition, he was accused of having falsified the parliament roll so as to make it appear that the Commissioners had received unlimited powers. After reciting their appointment 'ad terminandum, dissoluto parliamento, certas petitiones in eodem Parliamento porrectas protunc minime expeditas,' the impeachment continues: 'Cujus concessionis colore Persone sic deputate processerunt ad alia generaliter Parliamentum illud tangentia; et hoc de voluntate regis: in derogationem Status Parliamenti, et in magnum incomodum totius Regni, et perniciosum exemplum. Et ut super factis eorum hujusmodi aliquem colorem et auctoritatem viderentur habere, Rex fecit Rotulos Parliamenti pro voto suo mutari et deleri, contra effectum concessionis praedictae.'—*Ibid.* p. 418.

ordinances at the King's will, and decreed the penalties of treason against all who should disobey them; and a former declaration of the two Houses, that the King's prerogative was as free and unimpaired as that of any of his predecessors,[1] was now construed as giving him the power to dispense with such statutes as controlled it. The career of tyranny and extortion upon which Richard had entered alienated all classes of the nation, and speedily led to his deposition. The time had now come of which the Parliament had warned the King in 1386, when it became 'lawful for his people, by their full and free assent and consent, to depose the King from his royal throne, and in his stead to raise up some other of the Royal race upon the same.'[2] In the solemn exercise of the greatest of its powers, Parliament was careful to observe every formality and precaution which the Constitutional lawyers of that day could suggest. But although Richard was induced to resign the Crown, and Henry of Lancaster laid claim to it, the deposition, the vacancy of the throne, and the subsequent election of Henry, are each recorded in the most distinct terms in the official entry on the rolls of Parliament.[3]

His deposition.

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[1] Rot. Parl. 15 Ric. II. iii. 279. [2] Knyghton, col. 2683.

[3] Rot. Parl. iii. 416–424.

[On villeins and their contests with their lords, as well as on the general question of their condition, reference may be made to the Derbyshire portion of the Burton Chartulary, 11th–14th centuries, edited by Gen. Hon. George Wrottesley, in the *Journal of the Derbyshire Archæological Society* for 1885. I have cited it in notes to this chapter as *Burton Chart.* The long contest between the Abbots of Burton and their villein tenants in Magna Oufra [Mickleover], who claimed to be free tenants, is very instructive as to 1 Ric. II. c. 6. Gen. Wrottesley holds (*op. cit.* 153), that 'the *villanus*, in fact, was really a well-to-do and usually prosperous tenant with fixity of tenure.' This seems rather too optimistic for a general statement of the villein's position. With regard to the true date of the extinction of villeinage, cf. *Arch. Rev.* 1888, vol. i. p. 444, Art. by Prof. Kovalevsky, who gives, from the Record Office, the text of two petitions addressed to Oliver Cromwell, as Lord Protector, by the tenants of Thomas Dykes, Esq., of Warthold, Cumberland, 1651, and by 'divers well affected persons in Lancashire and Cheshire counties against oppressing landlords,' 1654. On *nativi*, called Betaghs, or *betagii*, and on *gavellarii*, near Dublin, 14th cent., cf. Paper by Mr. Jas. Mills, *Journ. R. S. Ant. Irel.* 1890, N. S. vol. i. No. 1, p. 54. Augustinus, son of Michael McClerchæ, gave to Abp. Fulc, 1256–71, the land of Balyoroylf, with the Irish of both sexes which he had or ought to have in that town. *Lib Nig. Alani*, 318, cited *u. s.*—ED.]

CHAPTER IX.

PARLIAMENT UNDER THE LANCASTRIAN AND YORKIST KINGS.

(1399—1485.)

HENRY IV., HENRY V., HENRY VI., EDWARD IV., EDWARD V., RICHARD III.

The Lancastrian period: its characteristics

UNDER the Lancastrian Kings the Parliament was occupied rather in the consolidation and regulation of the results of former contests with the Crown than in the acquisition of any new fundamental rights. The Commons continued to exercise, with but slight opposition, the main rights which they had established during the 14th century,—voting taxes, appropriating the supplies, which they made dependent upon the redress of grievances, examining public accounts, controlling the internal administration, sharing in legislation, and intervening in questions of war and peace, and in all important business, foreign and domestic. But the chief characteristic of the period was the settlement of the internal constitution of Parliament, and the establishment of its principal forms of procedure and most essential privileges.[1] During the latter half of the 15th century, the House of Commons became much less independent than it had been under Edward III., Richard II., or Henry IV. The Wars of the Roses in the first place enhanced the power of the nobles

[1] 'C'est une époque plus remarquable par certains perfectionnements dans les ressorts du gouvernement parlementaire, que par la conquête de grands droits et par la formation d'institutions fondamentales.'—Guizot, Hist. du Gouv. Représ. ii. 413.

at the expense of the Commons, who proved invariably ready to give a Parliamentary sanction to the claims of a victorious military leader; and, finally, by almost annihilating the ancient nobility, left the Lower House to face unaided the augmented power of the Crown. But the growing importance of the popular assembly is proved by the attempts, which were now systematically made by the Crown and the nobility, to influence the elections in boroughs as well as in counties. A seat in the House of Commons, even as the representative of a borough constituency, became an object of ambition to the members of what would now be termed County families, and the higher social status to which the burgesses had attained is marked by the fact, to which Hallam calls attention, that in the reign of Edward IV., and not before, they received the addition of 'Esquire' in the returns made by the sheriffs.[1]

Increased importance of the Commons.

Taxation: conditional grants, appropriation of supplies, examination of accounts.

Instances of illegal taxation are very rare under the Lancastrian Kings. Under Richard II. the system of forced loans, of which we find the Commons complaining for the first time in the second year of his reign,[2] had been very extensively made use of, but the Lancastrian Kings seldom had recourse to this means of filling their coffers. In 1400, Henry IV. appears to have obtained an aid from a Great Council, but its members did not pretend to charge any besides themselves.[3] There is also an instance during the minority of Henry VI., of illegal conduct with respect

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[1] Midd. Ages, iii. 119. The importance attached to a seat in Parliament at this time, and the attempts made to influence the electors, are shown in the contemporary Paston correspondence. In vol. i. p. [337] we find the Duchess of Norfolk soliciting the influence of John Paston, Esq., at a county election. 'It is thought right necessarie,' she tells him, 'for divers causes that my Lord have at this tyme in the Parlement suche persones as longe unto him, and be of his menyall servaunts, wherin we conceyve your good will and diligence shal be right expedient.' The 'menyall servaunts' were 'our right welbelovid cosin and servaunts, John Howard and Syr Roger Chambirlayn.' In vol. ii[i]. p. [51], is a letter to the bailiff of Maldon recommending the election of Sir John Paston.—See also Freeman, Growth of Eng. Const. p. 197. [Paston Letters, *supra*, from Gairdner's ed., 1872–5.—ED.].

[2] Rot. Parl. 2 Ric. II. iii. 62.

[3] Hallam, Midd. Ages, iii. 85.

to a conditional grant of a subsidy; the Duke of Bedford and other lords having subsequently declared in Parliament, with the advice of the Judges, and others learned in the law, that the said subsidy was to be at all events collected and levied for the King's use, notwithstanding any condition in the grant.[1] But these were merely occasional exceptions to the admitted legal rule. In the same Parliament the Commons, in making a fresh grant, not only renewed the former conditions, but appropriated the supply, declaring that 'it ne no part thereof be beset ne dispensed to no other use, but only in and for the defense of the said roialme.'[2] Similar precautions had been taken in the grants made to Henry IV. In the 6th year of his reign (1404) the Commons granted a large subsidy on condition that it should be expended for the defence of the kingdom according to the form and extent of the grant, and not otherwise, and two treasurers of war, Thomas, Lord Furnivall, and Sir John Pelham, were appointed and sworn in Parliament to receive it, and account to the Commons at the next Parliament.[3] Thus, conditional grants, appropriation of supplies, and examination of accounts became the established usage.

Dependence of supply on redress of grievances.

The dependence of supplies on the redress of grievances originated under Richard II. It had previously been usual for the King not to answer petitions until the last day of the session, when the supplies had of course been granted. The attempt to invert this order of proceeding had been declared by Richard II.'s Judges to be high treason. But in the 2nd of Henry IV. the Commons again endeavoured to secure this important lever for the application of Parliamentary power. The King resisted firmly, and the Commons gave way for the time,[4] but the practice gradually gained ground.

First collision between

In 1407 (9 Henry IV.) a proceeding took place which is

[1] Rot. Parl. iv. 301.
[2] *Id.* p. 303.
[3] *Id.* iii. 546.
[4] *Id.* p. 453.

the two Houses.

interesting both as the first instance of a collision between the two Houses, and as the earliest authority for what are now two well-known axioms of Parliamentary law, viz.: (1) That all Money Bills must originate in the House of Commons, and (2) that the King ought not to take notice of matters debated in Parliament, until a decision be come to by both Houses, and such decision be regularly brought before him. It appears that the Lords, in the King's presence, had held a debate on the state of the kingdom, and in answer to his demands, had specified certain subsidies as being requisite for the national defence. The King then requested the Commons to send a deputation to the House of Lords to hear and report to their fellows what they should have in command from the King, 'to the end that they might take the shortest course to comply with the intention of the said Lords.' Twelve of the Commons accordingly attended and made their report to the rest of the Lower House, who were thereupon 'greatly disturbed at it, saying and affirming it to be much to the prejudice and derogation of their liberties.' 'And after that our lord the King had heard this,' the entry on the roll proceeds, 'not willing that anything should be done at present, or in time to come, that might anywise turn against the liberty of the Estate for which they are come to Parliament,[1] nor against the liberties of the Lords,—wills and grants, and declares, by the advice and assent of the Lords, in manner following: that it shall be lawful *for the Lords to commune amongst themselves* in this present Parliament, and in every

All money bills must originate in the Commons.

The King ought not to notice matters pending in Parliament.

[1] The true position of the House of Commons as not being in itself an Estate of the Realm but the representative of the estate of the Commons of England, is here expressed. In the same way, the knights, citizens, and burgesses assembled in the Parliament of 1406 (7 Hen. IV.) which settled the succession to the Crown, are described as the 'procurators and attorneys of all the counties, cities, and boroughs, and of the whole people of the kingdom.' Although only elected by a portion of the population they were regarded as in effect procurators and attorneys for the whole. At this period the Parliamentary franchise was at its maximum; under Henry VI. it sank to its minimum. Subsequent extensions of the suffrage have been merely attempts to render the essentially representative character of the Commons' House more real and national. [As to Extensions of the Suffrage, and their effect, see *post*, Appendices.—ED.]

other in time to come, *in the absence of the King*, of the state of the realm, and of the remedy necessary for the same. And that in like manner it shall be lawful *for the Commons*, on their part, *to commune together* of the state and remedy aforesaid. Provided always that the Lords on their part, and the Commons on their part, shall not make any report to our said lord the King of any *grant by the Commons granted, and by the Lords assented to*, nor of the communications of the said grant, before the *Lords and Commons shall be of one assent* and one accord in such matters, and then in manner and form accustomed, that is to say, *by the mouth of the Speaker of the Commons*, in order that the Lords and Commons may have their will (lour gree) of our said lord the King.'[1]

Petitions assume the form of complete Statutes under the name of *Bills*.

Originally, not only grants of money but, as we have seen, almost all statutes originated in the proceedings of the House of Commons. The practice of drawing up the statutes from the petitions and answers after the session of Parliament had closed, led to the commission of frequent frauds on the part of the King's officers, who often entered Acts of Parliament on the rolls, differing materially from what the Commons had petitioned for, and the King granted.[2] During the fourteenth and fifteenth centuries many attempts were made by the Commons, from time to time, to remedy this abuse. In 1414 (2nd Henry V.) they presented a petition to the King, which is not only important on account of its subject matter, but interesting as the earliest instance in which the House of Commons adopted the English language in their petitions.[3] After asserting that

[1] Rot. Parl. iii. 611.

[2] [This was a very important matter, and affected also the Records of Chancery. Mr. Clifford, *Hist. Private Bill Legislation*, vol. i. 325, cites a case in 1404, where the Commons complained that a Subsidy Act had been entered on the Rolls of Chancery in a form contrary to the actual grant by them, and prayed for the declaration of their intention in making the grant in the then sitting Parliament, and for instructions to be given to the Barons of the Exchequer that the subsidy should not be levied in its untrue form. The same danger was probably the moving cause of the demand of the Commons in 1406 that 'certeins de les Communes' should be present at the engrossment of the Rolls of Parliament.—ED.]

[3] Hallam, Midd. Ages, iii. 90. As early as 1363, the Chancellor addressed the Parliament in English in his opening address. Rot. Parl. ii. 283.

it had ever been their liberty and freedom that there should be no statute or law made unless with their assent, the Commons proceed: 'Consideringe that the Comune of youre lond, the whiche that is, and ever hath be, a membre of youre Parlement, *ben as well Assentirs as Peticioners*, that fro this tyme foreward, by compleynte of the Comune of eny myschief axkynge remedie by mouthe of their Speker for the Comune, other ellys by Petition writen, that ther never be no Lawe made theruppon, and engrosed as Statut and Lawe, nother by addicions, nother by diminucions, by no maner of terme ne termes, the whiche that sholde chaunge the sentence, and the entente axked by the Speker mouthe, or the Petitions biforesaid yeven up yn writyng by the manere forsaid, withoute assent of the forsaid Comune. Consideringe oure soverain lord, that it is not in no wyse the entente of youre Comunes, zif hit be so that they axke you by spekying, or by writyng, too thynges or three, or as manye as theym lust: But that ever it stande in the fredom of your hie Regalie, to graunte whiche of thoo that you luste, and to werune the remanent.' In reply the King, 'of his grace especial graunteth that fro hensforth *no thyng be enacted* to the Peticions of his Comune, that be *contrarie of hir askyng, wharby they shuld be bounde withoute their assent.* Savyng alwey to our liege Lord his real Prerogatif, to graunte and denye what him lust of their Petitions and askynges aforesaide.'[1] Under Henry VI., the Commons made an apparently formal but essentially important innovation, by introducing complete statutes under the name of Bills—*petitiones formam actuum in se continentes.*[2] These were sent up to the Lords, and if passed there, presented to the King to be accepted or rejected simply, without any alteration. Later on the House of Lords also began to originate Bills, which were sent thence to the Commons; and it gradually became the established rule of Parliament, that with the exception of Money-Bills, which

[1] Rot. Parl. iv. 22.
[2] Ruffhead's Statutes, i. 16 (pref.).

must come from the Commons, and of Bills affecting the Peerage (*e.g.*, for the restitution of forfeited honours), which must come from the Lords, all other Bills might be originated in either House.

Dispensing and Suspending powers of the Crown.

The legislative authority of Parliament was still often rendered nugatory by the exercise of the Dispensing and Suspending powers of the Crown. These two terms are frequently used indiscriminately; but there is a very appreciable difference in their strict signification. (1) The *Dispensing* power consisted in the exemption of particular persons, under special circumstances, from the operation of penal laws; being, in fact, an anticipatory exercise of the undoubted right of the King to pardon individual offenders.[1] (2) The *Suspending* power was employed in nullifying the entire operation of any statute or any number of statutes; and was in its nature incompatible with the existence of Constitutional government.

This encroachment on the liberty of the subject appears to have been derived from the practice of the Papacy, whose example in issuing Bulls '*non obstante* any law to the contrary,' was soon followed by our Kings in their proclamations, grants, and writs.[2] Henry III. was perhaps the first to make use of the *non obstante* clause, and his successors throughout the Plantagenet period frequently exerted both the Dispensing and Suspending power. It was

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[1] 'To pardon a criminal, after he has been guilty, is indeed less dangerous to society than to give a previous indulgence to the commission of crimes; but in a rude age this difference is likely to be overlooked. Hence the origin of the dispensing power . . . which, as long as it was kept within a narrow compass, appears to have excited little attention.'—Millar, Hist. Eng. Gov. ii. 405.

[2] [Canon Robertson, *Hist. Christ. Church*, 1874, vi. p. 407, states that the documents by which patronage was usurped by the Popes were 'from the time of Innocent IV. (1243–54) rendered more peremptory by the introduction of the phrases *de plenitudine potestatis* and *non obstantibus*,' and notes that 'a great outcry was raised in England when a like favour was claimed for the king by introducing the words *non obstantibus* into secular documents, A.D. 1251.' Prynne's date, 1250–54, Animad. 4th Inst. 133, is fairly close to the history of the clause in Papal Provisions. Bp. Grossetête called it 'the unholy *non obstante* clause,' and declared that resistance to it in Papal documents was 'not rebellion, but an act of imperative duty.'—Greenwood, *Cathedra Petri*, Suppl. vol., p. 183.—ED.]

usually, however, only asserted in matters of small moment, and even then it was not allowed to pass without remonstrance and attempts at restraining it. Matthew Paris relates that when Henry III. on one occasion justified his use of the clause *non obstante* by quoting the authority of the Pope, he was interrupted by the Prior of the Hospitallers [1] with 'What is that you say, my lord King? Far be it that such a graceless and absurd speech (*verbum illepidum et absurdum*) should proceed from your mouth. As long as you observe justice you will be King, but so soon as you infringe it you will cease to be King.' To which, continues the chronicler, the King too hastily replied: 'What do you mean by that, you English, do you wish to cast me down from my kingdom, as was my father before me, and then to slay me?' [2]

In the 15th of Richard II. (1391), the Commons 'for the great affiance that they have in the person of our lord the King, and in his very excellent sense, and in the great regard which he has for his crown and the rights of the same, and also in the noble and high discretion of the Lords, assented, in full Parliament, that the King, by the advice and assent of the said Lords, might make such sufference respecting the Statute of Provisors as should seem reasonable and profitable to him until the next Parliament, but so that the said statute be not repealed in any article of the same; and, moreover, that the Commons may disagree thereto at the said next Parliament and resort to the

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[1] 'Magister Hospitalis Hierosolymitani in domo de Clerkenwelle, quem Priorem appellant.' The official here referred to was probably Joseph de Chauncey, Prior 1270–1280 (Kemble, Introd. to the Knights Hospitallers in England, Camden Soc., p. lxvii.). ['Graceless' hardly seems a good translation of *illepidum*, but the Prior of the Hospitallers doubtless meant something stronger than 'inelegant.'—ED.]

[2] Matt. Paris, Hist. Major, 854 (ed. 1640). [The words of the Grand Prior of the Hospitallers sound like a sort of echo of the historic language of the Cortes of Aragon on the accession of a King: 'Thou shalt swear to respect our rights and liberties. If thou dost, thou shalt be our King: if not, thou shalt not be our King.' M. Boutmy cites these words in illustration of the attitude of the English Convention Parliament towards William of Orange and the Princess Mary. *Nouv. Rev. Hist. de Droit*, 1878, p. 54, Art. *Les Sources de la Const. Angl.*—ED.]

statute;' protesting, at the same time, that this assent 'which was a novelty and had never been given before' should not be drawn into precedent. The same limited power of suspension was renewed in Henry IV.'s Parliaments.[1] But in the 1st of Henry V., when the Commons prayed that the statute for driving aliens out of the kingdom might be executed, the King granted their request with a proviso that he might dispense with the statute when he pleased. In 1444, however, it was specially enacted by a statute which declared void all patents to hold the office of sheriff for more than a year, not only that the King should not dispense with this provision, but that all pardons and remissions of penalties granted by him to persons acting contrary to it, should be of no effect.[2] A constant struggle respecting the exercise of this prerogative seems to have been maintained for centuries between the Crown and the upholders of Constitutional freedom, in which sometimes one side prevailed and sometimes the other.[3] In Henry VII.'s reign it was decided that the King could not dispense with penalties for an act which was *malum in se* (against Common Law); but that he could do so with respect to an act which was *malum prohibitum* merely (that is, an offence created by Statute).[4] Subject to this restriction, and some others, the Dispensing and Suspending power[s were] repeatedly exercised during the 16th and 17th centuries, and acknowledged as a legal prerogative of the Crown. Under the Stuarts [they] began to be more frequently abused; and the determination of James II. to employ [them] as a means of abrogating the fundamental laws of the Kingdom eventually cost him his Crown. The obnoxious prerogative was finally abolished by the Bill of Rights.[5]

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[1] Rot. Parl. iii. 285, 301. [These seem to be, technically, at least, instances of a Parliamentary, not a Prerogative, suspension.—ED.]

[2] 23 Hen. VI. c. 8.

[3] The conflicting authorities on the legality of the dispensing power are summarised in the note to the Seven Bishops' case in Broom's Const. Law [Denman's ed., 492–506.—ED.]

[4] *Ibid. loc. cit.*

[5] [M. Boutmy, in a note to his Art., *Les Sources de la Const. Angl.*, criticises

Right of enquiring into public abuses and controlling the Royal administration.

The right of enquiring into public abuses, and controlling the Royal administration of both home and foreign affairs, was frequently exercised by the Commons during the Lancastrian period.

In the 5th of Henry IV. the Commons requested the King to remove several of his Ministers, together with his confessor, and although the King protested that he knew of no cause or occasion for their removal, yet being assured that whatever the Lords and Commons did or ordained was for the benefit of himself and kingdom, he removed them; adding that he would do as much by any other about his person whom he should find to have excited the hatred or indignation of his people.[1]

Unlearned Parliament.

The 'Unlearned Parliament,' as that of the 6th of Henry IV. was termed because lawyers were excluded from it, rescinded the grants already made by the Crown, and prohibited the King from alienating the ancient Royal inheritance without consent of Parliament;[2] thus reasserting the ancient control which the Witan had exercised over the granting out of the Folkland before it developed into *Terra Regis.*

Petition of Thirty-one Articles. 8 Hen. IV. 1406.

In the 8th of Henry IV. (1406) the Commons presented their famous Petition of Thirty-one Articles, which Hallam has characterised as 'a noble fabric of constitutional liberty, and hardly perhaps inferior to the Petition of Right under Charles I.' Henry accepted all the articles without reserve. The most important provisions were: (i.) the King 'should elect and name sixteen counsellors and officers pleasing to God and agreeable to his people, on whom he could rely, to advise him and be of his Continual Council until the next Parliament, and a reasonable number of whom should

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the attenuated condemnation of the Dispensing Power implied in the words 'as it hath beene assumed and exercised of late.' 'C'était reconnaître,' M. Boutmy forcibly remarks, 'qu'il existait encore, et qu'il était en principe légitime.' *Nouv. Rev. Hist. de Droit*, 1878, p. 65, note 1. This attenuation in the Declaration of Right, however, disappears in sec. xii. of the Bill of Rights —ED.]

[1] Rot. Parl. iii. 525.

[2] Rot. Parl. iii. 547.

be continually about his person': none of them to be dismissed without conviction of misdemeanour. (ii.) The Chancellor and Privy Seal should pass no grant or other matter of the Seals contrary to law, or delay any which ought to be passed. (iii.) Persons about the court stirring up the King's or Queen's minds against any of their lieges, and duly convicted thereof, to lose their offices and be fined. The King's ordinary revenue (vi.) should be wholly appropriated to his household and the payment of his debts; no grant of wardship or other profit to be made thereout, nor any forfeiture to be pardoned. The King, (viii.) 'considering the wise governance of other well governed Christian princes, and conforming himself thereto,' was to assign two days in the week for the reception of petitions, 'it being a most honourable and necessary thing, that such of his lieges as desired to petition him should be heard.' No officer of the Treasury, Chancery, or the Household, to enjoy his place for life or term of years; he should personally perform his duties, without appointing a substitute, or letting his office to farm. No petition (ix.) to be presented to the King by any of his household at times when the Council were not sitting. The Council (x.) should determine nothing cognisable at common law, unless for a reasonable cause and by the advice of the Judges. The statutes and ordinances (xi.) regulating purveyance, both those of the household and those made in Parliament, were affirmed. Abuses of various kinds (xii.–xxii.) in the Council and the Courts of Justice, including bribery and the exaction of excessive fees, were enumerated and forbidden; and the election of knights of the shire (xxiii.) regulated. The Council and chief officers of state (xxiv.) were to be sworn in Parliament to observe the common law of the land, and the statutes and ordinances before made and ordained, as well for the King's household as for the good government of the realm of England. The administration of the Courts of Law and of the Household (xxvi.–xxx.) was to be regulated, and full enquiry made by the Chancellor and Treasurer of England, seneschal and treasurer of the house-

hold, the Justices of either bench and the Barons of the Exchequer, each in his place and office, into all torts, oppressions and defaults done to the people who had had business therein, and a report sent in to the Great Council in order that full and due correction might be made. Finally (xxxi.), these Articles should be in force only from the beginning of the then present Parliament until the close of the next.[1]

Right of the Commons to be consulted as to peace or war and in all questions of national interest.

The right to be consulted in questions of war and peace, which the Commons had established under Edward III., and maintained under Richard II., was extended under the Lancastrians so as to include all questions of national interest. In the 4th of Henry V. the Parliament confirmed the League between the King and the Emperor Sigismund; and the important Treaty of Troyes was similarly submitted to and ratified by both Houses.[2] By one of the articles of this Treaty it was stipulated that no negotiations with the Dauphin should be undertaken without the consent of the three Estates of both kingdoms. Accordingly, under Henry VI. both Houses of Parliament granted leave to Commissioners on the King's behalf to treat of peace with France. In the same reign, Parliament also concurred in the appointment of Commissioners to treat of the deliverance of the King of Scots; in the grant of denization to the Duchesses of Gloucester and Bedford; and in the appointment of mediators to reconcile the Dukes of Gloucester and Burgundy.[3]

Impeachment.

The right of impeaching Ministers lay dormant from the reign of Richard II. to the 28th year of Henry VI.; unless we may regard as an informal exercise of it the proceeding of the Commons in the 1st of Henry IV., when, without preferring specific articles of accusation, they petitioned the King that Justice Rickhill, who had been employed to take the late Duke of Gloucester's confession at Calais, and

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[1] Rot. Parl. 8 Hen. IV., iii. 585–9.
[2] Rot. Parl. iv. 98, 135 [*Tres status Regni approbarunt*].
[3] Rot. Parl. iv. 211, 242, 277, 371.

the Lords who had formerly appealed the Duke and his associates of treason, should be put on their defence before the Peers.[1] In 1449 (28 Henry VI.) the Commons determined to prosecute the Duke of Suffolk, William de la Pole (grandson of Michael), on charges of high treason, chiefly relating to his conduct in France while negotiating the unpopular marriage of the King with Margaret of Anjou. The Judicial power, which had at one time lodged in the whole Parliament, had been declared in 1399, at the suggestion of the Commons themselves, to reside in the Lords only.[2] In Impeachments the Commons are only accusers and advocates, while the Lords alone are judges of the crime. But in Suffolk's case the Commons appear to have been desirous of a voice in the judgment as well as in the accusation, and accordingly proceeded by what appears to have been a Bill of Attainder.[3] But the process was tainted by much irregularity, of which the King took advantage, and, in order to screen his favourite Minister and save the life of a probably innocent man, banished him for five years. Suffolk had abstained from putting himself upon his peerage, and while protesting his innocence, placed himself entirely in the King's hands: the King moreover declared that he acted by his own advice and not that of the Lords, and not by way of judgment, but on the ground of the Duke's submission. But the proceeding was rightly regarded as an illegal stretch of prerogative,

Bills of Attainder.

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[1] Rot. Parl. iii. 430, 449.

[2] *Ibid.* iii. 427. [Les Juggementz du Parlement appertiegnent soulement au Roy & as Seigñrs.]

[3] 'The proceedings of Parliament in passing bills of attainder, and of pains and penalties, do not vary from those adopted in regard to other bills. They may be introduced into either house, but ordinarily commence in the House of Lords: they pass through the same stages; and, when agreed to by both Houses, they receive the royal assent in the usual form. But the parties who are subjected to these proceedings are admitted to defend themselves by counsel and witnesses before both houses; and the solemnity of the proceeding would cause measures to be taken to enforce the attendance of members upon their service in Parliament. In evil times this summary power of Parliament to punish criminals by statute has been perverted and abused; and in the best of times it should be regarded with jealousy; but, whenever a fitting occasion arises for its exercise, it is undoubtedly the highest form of parliamentary judicature.'—May, Parl. Pract. [1883], p. [744].

and was immediately protested against by the Lords, who declared that it should form no precedent to bar them or their heirs of the privileges of peerage.[1]

Privileges of Parliament.

It was under the Lancastrian kings that the Privileges of Parliament first began to attract attention.

As enjoyed by either House, in its collective capacity or in the persons of its individual members, these privileges are various and important. They all rest either upon the ancient law and custom of Parliament solely, or upon that law and custom as defined by statute. Three of them claim special attention: (1) freedom of speech; (2) freedom from arrest and special protection against assault; (3) the right of the Commons to determine contested elections.[2]

(i.) Freedom of speech.

I. Freedom of Speech, the essential attribute of every free Legislature, may be regarded as inherent in the constitution of Parliament. At an early period it was recognised and confirmed as the law of the land. 'The Commons did oftentimes, under Edward III.,' says Elsynge,[3] 'discuss and debate amongst themselves many things concerning the king's prerogative, and agreed upon petitions for laws to be made directly against his prerogative, as may appear by divers of the said petitions, yet they were never interrupted in their consultations, nor received check for the same, as may appear also by the answers to the said petitions.'

Haxey's case, 20 Ric. II. [1397].

The arbitrary violation of the freedom of speech in Haxey's case by Richard II. has already been noticed.[4] This proceeding eventually led to a signal confirmation of

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[1] Rot. Parl. v. 176–182.

[2] For a historical and legal account of the various branches of Parliamentary privilege, see May's Parliamentary Practice. The phrase 'privilege of Parliament' is now of much wider signification than formerly. In strictness, Parliamentary privilege was originally fourfold: (1) free access to the King; (2) the right to the most favourable interpretation by him of Parliamentary sayings and doings; (3) freedom of speech; and (4) freedom from arrest. The right of the Commons to determine contested elections was not originally regarded as a privilege of Parliament, and was not completely established till the reign of Elizabeth.

[3] Elsynge, Ancient method of holding Parliaments, p. 177.

[4] *Supra*, p. 318.

the privilege. In the 1st of Henry IV. (1399) the judgment against Haxey was twice reversed and annulled; in the first instance, on his own petition, by the King and the Lords spiritual and temporal; and again on the petition of the Commons. The privilege was thus acknowledged by the highest Judicial authority,—the King and the House of Lords,—and by an enactment of the whole Legislature.[1]

The King not to take notice of speeches in Parliament.

In the next year (2nd Henry IV.) the Commons, by their Speaker, showed the King 'how that when certain matters were moved among them, some of their body, to please the King, and to advance themselves, would inform the King of such matters, before the same had been discussed and agreed upon among the said Commons, by which the King might be incensed against them, or some of them;' wherefore they prayed him not to take notice of any reports that might be made to him of their proceedings. To this he replied that it was his wish that the Commons should deliberate and treat of all matters amongst themselves, in order to bring them to the best conclusion, ... and that he would hear no person, nor give him any credit, before such matters were brought before the King by the advice and consent of all the Commons, according to the purport of their petition.[2]

The declaration of the King, in the 9th year of his reign (1407), acknowledging the right of the Commons to initiate Money Bills and also the independent right of free discussion residing in both Houses of Parliament, has been already referred to.[3]

Yonge's case, 33 Hen. VI. 1455.

In the 33rd of Henry VI. Thomas Yonge, one of the 'knights for the shire and town of Bristol,' complained to the Commons that he had been arrested and imprisoned in the Tower, five years previously, 'for matters by him showed in the House,'—namely, a motion made by him that, the King then having no issue, the Duke of York

[1] Rot. Parl. iii. 430, 434; May, Parl. Prac. [9th ed. 119].
[2] Rot. Parl. iii. 456.
[3] *Supra*, p. 325.

might be declared heir-apparent to the Crown. The Duke was now Protector, and the occasion, therefore, favourable for the presentation of Yonge's complaint and claim for compensation. The Commons transmitted his petition to the Lords, and the King 'willed that the lords of his council do and provide for the said suppliant, as in their discretion should be thought convenient and reasonable.'[1]

Strode's case, 4 Hen. VIII. 1512.

Nothing further occurred on the subject of freedom of debate until the 4th of Henry VIII. (1512), when, in consequence of the proceedings in *Strode's case*, an important Act was passed, which not only admitted, by implication, the existence of the privilege, but was designed to protect, in future, all members of either house from any question on account of their speeches or votes in Parliament. Richard Strode, member for the borough of Plympton in Devonshire, had been prosecuted in the Stannary Court,[2] for having proposed certain Bills in Parliament to regulate the tinners in Cornwall. He was in consequence fined and imprisoned, as the statute recites, 'in a doungen and a depe pytt under grounde in the Castell of Lidford, and there and elsewhere remayned by the space of thre wekys and more, unto such tyme he was delyvered by a wrete of Privilege out of the Kyngges Eschequer at

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[1] Rot. Parl. v. 337.

[2] The Court for the Stannaries of Cornwall and Devon is a court of special jurisdiction, similar in character to the court of the Lord Warden of the Cinque Ports, the courts of the Counties Palatine of Lancaster and Durham, and other special courts instituted, in derogation from the general jurisdiction of the Courts of Common Law, for the local redress of private wrongs. It is founded on an ancient privilege granted to the workers in the tin mines to sue and be sued (in all matters arising within the Stannaries, excepting pleas of life, land, or member) in their own court before a judge called the Vice-Warden of the Stannaries. This privilege was confirmed by charter of 33 Edward I., and by statutes 50 Edward III. and 16 Car. I. c. 15, and the court has been regulated by several recent statutes. Formerly an appeal lay from the Stannary court to the Lord Warden, from thence to the privy council of the Prince of Wales as Duke of Cornwall, and from thence to the Sovereign; but by statute 18 & 19 Vict. c. 32, s. 26, an appeal from all decrees and orders of the Vice-Warden was given to the Lord Warden assisted by two legal assessors, and from the Lord Warden a final appeal to the Judicial Committee of the Privy Council (Stephen, Commentaries, iii. 466). By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 36) all the jurisdiction and powers of the Lord Warden of the Stannaries assisted by his assessors have been transferred to the new Court of Appeal established by that Act.

Westminster, for that he was one of the collectours in the said countie for the first of the twoo quyndezims graunted at and in this present Parliament.' The statute[1] proceeds to declare these proceedings of the Stannary Court void, and further: 'That [all] sutes, accusementes, condempnacions, execucions, fynes, amerciamentes, punysshmentes, &c., putte or had, or hereafter to be put or hadde unto or uppon the said Richard [Strode], and to every other of the person or persons afore specified ['other of this House'] that nowe be of this present Parliament, or that *of any Parliament herafter shalbe*, for any bill, spekyng, reasonyng, or declarying of any mater or maters concernyng the Parliament, to be communed and treated of, be utterly voyd and of none effecte.'

Stat. 4, Hen. VII c. 8.

Thirty years later, in 1541, the Commons, by the mouth of their speaker, Thomas Moyle, appear, for the first time, to have included freedom of speech among their 'ancient and undoubted rights and privileges' claimed from the King at the commencement of each Parliament.[2]

Freedom of Speech claimed by the Speaker in 1541.

In 1621 the Commons declared 'that every member hath freedom from all impeachment, imprisonment or molestation, *other than by censure of the House itself*, for or concerning any bill, speaking, reasoning, or declaring of any matter or matters touching the Parliament or Parliamentary business.'[3]

Declaration of the Commons in 1621.

But notwithstanding the undoubted right of the Commons to the enjoyment of this privilege, it was, like so many other of their Constitutional rights, frequently violated by the Crown during the Tudor and Stuart periods.[4]

The privilege often violated.

The last occasion on which it was directly impeached was in the celebrated case of Sir John Eliot, Denzil Holles,

Case of Eliot, Holles, and Valentine, 5 Charles.

[1] 4 Hen. VIII. c. 8. [Rev. Stat. i. 373–4.—Ed.]
[2] Rot. Parl. 33 Hen. VIII.; May, Parl. Prac. [120]. Hatsell, Precedents, i. 79.
[4] See the cases of Strickland in 1571; of Cope, Wentworth, and others in 1588; and of Sir Edwin Sandys in 1621.—D'Ewes, 166, 410; Com. Journal, 635; *infra*, chaps. xii., xiii.

and Benjamin Valentine, whose prosecution was one of those illegal acts which hastened the ruin of Charles I. In the 5th year of his reign (1630), a judgment was obtained in the Court of King's Bench against these members for their conduct in Parliament, the statute of the fourth Henry VIII. being falsely assumed to be merely a private Act for the relief of Strode, and not of general application. In 1641, the House of Commons declared all these proceedings in the King's Bench to be against the law and privilege of Parliament; and in 1667, after the Restoration, they passed another resolution: 'That the Act of Parliament in 4th Henry VIII. commonly entitled "an Act concerning Richard Strode" *is a general law*, extending to indemnify all and every the members of both Houses of Parliament, in all Parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the Parliament to be communed and treated of; *and is a declaratory law of the ancient and necessary rights and privileges of Parliament.*' They subsequently resolved 'that the judgment given, 5 Car., against Sir John Eliot, Denzil Holles, and Benjamin Valentine, in the King's Bench, was an illegal judgment, and against the freedom and privilege of Parliament.' On a conference, both these resolutions were agreed to by the Lords; and finally, on a writ of error, the judgment of the Court of King's Bench was reversed by the House of Lords, on the 15th of April, 1668.[1] The privilege was confirmed, for the last time, by the Bill of Rights, the 9th article of which declared, 'That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.'[2]

The privilege confirmed by Bill of Rights.

(ii.) Freedom from arrest.

II. The privilege of freedom from arrest or molestation is probably coeval with the first existence of National Councils in England. A law of Ethelbert, the first Christian King of Kent, at the end of the 6th century, provides that

[1] Lords' Journ. xii. 223; May, Parl. Prac. [123].
[2] 1 Will. and Mary, sess. 2, c. 2; *infra*, ch. xv.

'If the King call his "leod" (people) to him [*i.e.*, in the Witenagemot] and any one there do them evil, let him compensate with a two-fold "bot" and fifty shillings to the King.' So Cnut, in the early part of the eleventh century, declares 'that every man be entitled to "grith" [immunity from molestation] to the gemôt and from the gemôt, except he be a notorious thief.'[1] This immunity from arrest (except for treason, felony, or breach of the peace) is useful and indeed necessary; but formerly not only the members of both Houses, but their servants and their property also, were included in the special protection, during the time over which privilege was supposed to extend, *i.e.*, forty days before and after the meeting of Parliament.

Case of Bishop of St. David's, 18 Edw. I.

In the 18th of Edward I. (1290) the Master of the Temple petitioned the King for leave to distrain for the rent of a house held of him by the Bishop of St. David's and was answered: 'It does not seem fit that the King should grant that they who are of his council should be distrained in time of Parliament;'[2] but at another time let him distrain '*per hostia et fenestras prout moris est.*'

Prior of Malton's case, 9 Edw. II.

Statute 11 Hen. VI. c. 11.

The privilege was also distinctly acknowledged by the Crown in the 9th of Edward II. (1315) in the case of the Prior of Malton, who had been arrested on his way from Parliament.[3] It was not however always respected; and at length in the 11th of Henry VI. (1432), the Commons obtained a statute for the punishment of such as assault any on their way to Parliament, giving double damages —as in the law of Ethelbert—to the injured party.[4] But the privilege was not founded on the statute, which was

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[1] Ethelbert, c. 1; Cnut, Sec. Dooms, c. 83; Thorpe, Anc. Laws and Inst. of Ang. Saxons. Cnut's law was evidently intended to apply to persons coming to the Witenagemot on private business as well as to those summoned to give counsel and consent. So a law of Edward the Confessor (Leges Edw. Conf. art. 2, cl. 8) provides 'ad synodos venientibus, sive summoniti sint, sive per se quid agendum habuerint, sit summa pax.'

[2] Rot. Parl. i. 61.

[3] Hatsell, Precedents, i. 12.

[4] 11 Hen. VI. c. 11. Three years previously the clergy had got a similar privilege, by statute 8 Hen. VI. c. 1, for themselves and servants on their way to Convocation.

Petition of Commons, 5 Hen. IV

merely declaratory of the ancient law. In a petition to the King in the 5th of Henry IV. (1403), the Commons had alleged that, according to the custom of the realm, the lords, knights, citizens and burgesses were entitled to this immunity, and prayed that treble damages should be paid by persons violating it. The King admitted the privilege, but refused to extend the damages, on the ground that there was already a sufficient remedy.[1] So in the case of John Atwyll, member for Exeter, in the 17th Edward IV. (1477), the Commons affirmed that the privilege had existed 'whereof tyme that mannys mynde is not the contrarie.'[2]

Atwyll's case, 17 Edw. IV. [1477.]

Thorpe's case, 31 Hen. VI. [An exception.]

The sole exception to the recognition of this privilege was the celebrated case of Thomas Thorpe, Speaker of the Commons, and a Baron of the Exchequer, who in 1453 (31 Hen. VI.), during a prorogation of Parliament, was imprisoned in the Fleet on an execution, issuing out of his own Court of the Exchequer, for nonpayment of a fine due to the King for a trespass committed in seizing certain goods of the Duke of York. The Commons sent some of their members to complain to the King and Lords, and demand the release of the Speaker, and of Walter Rayle, another imprisoned member. The Judges, on being consulted by the Lords, declared by the mouth of the Chief Justice, speaking in the name of them all, 'after sadde communication and mature deliberation hadde amonge theim,' that 'they ought not to aunswere to that question, for it hath not ben used aforetyme that the Justicez shuld in eny wyse determine the Privelegge of this high Court of Parlement; for it is so high and so mighty in his nature that it may make lawe, and that that is lawe it may make noo lawe; and the determination and knowlegge of that Privelegge belongeth to the Lordes of the Parlement, and not to the Justices.' But they went on to admit the privi-

[*Chedder's case*, 1403.]

[1] Rot. Parl. iii. 541. The general principle of immunity was distinctly recognised in the special Act passed in the same year (5 Hen. IV. c. 6) in the case of Chedder, a member's servant, who had been assaulted and wounded.

[2] Rot. Parl. vi. 191.

lege, asserting that 'if any persone that is a membre of this high Court of Parlement be arrested in suche cases as be not for treason or felony, or suerte of the peas, or for a condempnation hadde before the Parlement, it is used that all such persones shuld be relessed of such arrestes, and make an Attourney, so that they may have theire fredom and libertee frely to entende upon the Parlement.' 'As for declaration of procedyng in the lawer Courtes,' they observed, 'ther be many and diverse Supersedeas of Privelegge of Parlement brought in to the Courtes, but there ys *no generall Supersedeas* brought to surcesse of all processes; for if ther shuld be, it shuld seeme that this high Court of Parlement, that ministreth all Justice and equitee, shuld lette the processe of the commune lawe, and so it shuld put the partie compleynaunt withoute remedie, for so muche as actions atte commune lawe be not determined in this high Court of Parlement.' Although, according to this opinion of the Judges (notwithstanding their evident disinclination to 'lette the processe of the commune lawe'), Thorpe was clearly entitled to his release, the Lords determined 'that the seid Thomas, accordyng to the lawe, shuld remayn stille in prisone for the causes abovesaid, the Privelegge of the Parlement, or that the same Thomas was Speker of the Parlement, notwithstondyng;' and the Commons were directed in the King's name to proceed 'with all goodly hast and spede' to the election of a new Speaker, which they did the next day.[1] This extraordinary decision can only be accounted for by the fact that Thorpe was a staunch Lancastrian, and an old enemy of the Duke of York. The whole case was subsequently characterised in Parliament, as 'begotten by the iniquity of the times.'[2]

Originally members released from custody by special

The existence of this privilege, recognised as it had been by statute, by declarations of both Houses, by the frequent assent of the King, and by the opinion of the Judges, to which reference has been made, was undoubted;

[1] Rot. Parl. v. 239, 240.
[2] Com. Journ. i. 546.

Act of Parliament or by Writ of Privilege.

but it was not until the year 1543 that the Commons proceeded to deliver a member out of custody, or to commit any one to prison, by their own sole authority. Down to that year members had been released either (1), when taken in execution after judgment, by virtue of a special Act of Parliament; or (2), when confined on mesne process only, by a writ of privilege issued by the Chancellor.[1]

Ferrers's case, 1543. *For the first time the Commons release a member by their own authority.*

The first occasion on which the Commons acted independently of any other power in the vindication of their privilege was in the important case of George Ferrers, a member who, in 1543, was arrested, as surety for the debt of another, by process out of the King's Bench. On hearing of the arrest, the House sent their Serjeant to demand the release of the imprisoned member. The Serjeant, being resisted by the gaolers and Sheriffs of London, was obliged to return empty handed; whereupon the House rose as a body and laid their case before the Lords, 'who, judging the contempt to be very great, referred the punishment to the order of the Commons' House.' The Lord Chancellor offered them a writ of privilege, but they refused it, 'being of a clear opinion that all commandments and other acts proceeding from the Nether House were to be done and executed by their serjeant without writ, only by show of his mace, which was his warrant.' Accordingly the Serjeant was again ordered by the Commons to go to the Sheriffs and demand the delivery of Ferrers; but in the meantime the Sheriffs, becoming alarmed, had surrendered the prisoner. They were, however, ordered by the House to attend at the bar, together with the gaolers and even the plaintiff in the suit, and on appearing were all committed to prison for contempt. These proceedings were reported to King Henry VIII., who thereupon summoned the Chancellor, Judges, the Speaker, and some of the gravest

[Remarkable] Speech of Hen. VIII. [on Ferrers's case.]

[1] Hatsell, i. 53; May, Parl. Prac. [130]. Special acts were passed to enable the Chancellor to issue writs for the release of Larke, a member's servant, in 8 Hen. VI., of Clerke, 39 Hen. VI., of Hyde, and of Atwyll, 14 & 17 Ed. IV. —Rot. Parl. iv. 357; v. 374; vi. 160, 191; Hatsell, i. 17–22, 34–36. Arrest on 'mesne (=intermediate) process' was an arrest by virtue of a writ issued after the commencement of a suit but before judgment.

persons of the Commons, and delivered a very remarkable address. After commending the wisdom of the Commons in maintaining the privileges of their House, and stating that even their cooks were free from arrest, he is reported to have said: 'And further we are informed by our judges that we at no time stand so highly in our estate royal, as in the time of Parliament; wherein we as head, and you as members, are conjoined and knit together into one body politick, so as whatsoever offence or injury, during that time, is offered to the meanest member of the house is to be judged as done against our person and the whole court of Parliament; which prerogative of the court is so great (as our learned counsel informeth us), that all acts and processes coming out of any other inferior courts, must, for the time, cease, and give place to the highest.' Following the King, 'Sir Edward Montagu, the lord chief justice, very gravely declared his opinion, confirming by divers reasons all that the King had said, which was assented unto by all the residue, none speaking to the contrary.'[1] Ferrers was a servant of the King, who, probably on that account, was the more inclined to regard the energetic proceedings of the Commons with favour.

Henceforward, although a writ of privilege was still occasionally employed to effect the release of members, it was not permitted to be obtained without a previous warrant from the Speaker.

Smalley's case, 1575.

In 1575, Smalley, a member's servant, who had been arrested for debt, was set at liberty by the Serjeant of the House; and on its being subsequently discovered that he had fraudulently procured this arrest, in order to get rid of the debt, was committed to prison for a month and ordered to pay the plaintiff £100.[2] There are several other instances under Elizabeth of privileged persons being liberated by the Serjeant by warrant of the mace and not by writ;[3]

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[1] Holinshed, i. 824; Hatsell, i. 57; May, Parl. Prac. [131–2].
[2] Hatsell, i. 90.
[3] See the cases of Fitzherbert in 1592, and of Neale shortly afterwards.—Hatsell, i. 107; D'Ewes, 518, 520; and May, Parl. Prac. [132–3].

Case of Sir Thomas Shirley, 1603.

but the next important case was that of Sir Thomas Shirley in 1603, which led to a more distinct recognition of the privilege by statute, and to an improvement in the law. Sir Thomas had been imprisoned in the Fleet, on an execution for debt, before the meeting of Parliament. The Commons sent their Serjeant to demand his release. This being refused by the warden, he was committed to the Tower for contempt; but, still continuing obstinate through fear of becoming personally answerable for the debt, he was further committed to the prison called 'Little Ease' in the Tower. Shortly afterwards, through the interposition of the King, which the Commons had privately asked for, the warden delivered up the prisoner and was discharged after a reprimand.[1] This proceeding directed attention to two legal hardships attending the release of members taken in execution: (1) the Sheriff or warden was liable to an action for escape, and (2) the creditor lost his right to an execution. An Act was now passed by which it was for the first time declared: (1) that the officer should be discharged from all liability for delivering out of custody a person having a privilege of Parliament, and (2) that the creditor, at the expiration of the time of privilege, might sue out a new writ of execution. The Act also distinctly recognised as existing law: (1) the privilege of freedom from arrest; (2) the right of either House of Parliament to set a privileged person at liberty; and (3) the right to punish those who make or procure arrests.[2]

Statute 1 James I. c. 13. *First legislative recognition of the privilege.*

The privilege abused.

The extension of the privilege of members, so as to protect, not only their own persons, but their property, their servants, and their servants' property, from all Civil suits during the period of privilege, gave rise to very grave abuses. These were partially restrained by several statutes,[3] and at length, in 1770, an Act was passed, by which the privilege was reduced to its ancient dimensions,

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[1] Hatsell, i. 157; May, Parl. Prac. [134].
[2] 1 Jac. I. c. 13.
[3] 12 & 13 Will. III. c. 3; 2 & 3 Anne, c. 18; 11 Geo. II. c. 24.

protection from arrest for the persons of members only, leaving the course of justice as to their property and their servants entirely free.[1] By the effect of these various enactments the freedom of members from arrest has become not so much a Parliamentary privilege as a legal right; and consequently 'the arrest of a member has been held to be irregular *ab initio*, and he may be discharged immediately, upon motion in the court from which the process issued.'[2]

Arrest of members for contempt of a court of justice.

The privilege of freedom from arrest has always been limited to Civil causes, and has never been allowed to interfere with the administration of the Criminal law. But as regards one species of offence—contempt of a Court of Justice—which partakes of a Criminal character, it was for some time doubtful how far privilege would avail as a protection for members.

Lord Cromwell's case, in 1572.

In 1572, Henry, Lord Cromwell, complained to the Lords that his person had been attached by virtue of a writ out of Chancery, for not obeying an injunction of that Court. The Lords agreed that 'the attachment did not appear to be warranted by the common law or custom of the realm, or by any statute law, or by precedents of the Court of Chancery,' and ordered Lord Cromwell to be discharged. They added, however, that if at any future time it should be shown that by the Queen's prerogative, or by Common Law or Custom, or by any statute or precedents, the persons of Lords of Parliament are attachable, the order in this case should not affect their decision in judging according to the cause shown.[3] From this period down to 1757, the cases, as regards both Lords and Commons, were mainly in favour of privilege;[4] but in that year it was 'ordered and declared by the Lords that no peer or lord of Parliament hath privilege of peerage, or of Parlia-

Privilege not available in case of attachment for refusing to obey a writ of Habeas Corpus.

[1] 10 Geo. III. c. 50.
[2] May, Parl. Prac. [137].
[3] Lords' Jour. i. 727.
[4] See the cases of Mr. Brereton in 1605; of Sir W. Bampfield in 1614; of Lord Vaux in 1625; and of the Earl of Arundel shortly afterwards.—May, Parl. Prac. [156].

ment, against being compelled by process of the Courts of Westminster Hall, to pay obedience to a writ of Habeas Corpus directed to him.'[1] In the case of Earl Ferrers, it was decided that an attachment may be granted, if a peer refuse obedience to the writ.[2]

In recent times Parliament has not asserted its privilege in case of members committed for open contempt of court. But *the right still subsists.*

In more recent times, members committed by Courts of Law for open contempt have failed in obtaining release by virtue of privilege.[3] Not that either House of Parliament has waived its right to interfere when members are committed for contempt: but each case is considered upon its merits as it arises; and, although where the contempt has been flagrant protection has not been granted, 'privilege might still be allowed against commitment under any civil process, or if the circumstances of the case appeared otherwise to justify it.'[4]

(iii.) Right of the Commons to determine contested elections. Early abuse of the sheriff's power of returning members.

III. The growing power of the House of Commons is specially marked, during the Lancastrian period, by the earnest attention bestowed by Parliament upon the subject of elections. Owing to the unlimited power of the Sheriffs, gross abuses in the return of members very early crept in. It was to the Sheriff of each county that the King's writ was addressed, requiring him to return two knights for the county and two citizens or burgesses for each city or borough in his bailiwick. But as no particular cities or boroughs were specified in the writ, this functionary assumed the power of determining what cities and boroughs

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[1] Lords' Journ. xxix. 181.

[2] Burrow, Rep. 631.

[3] See the cases of Mr. Long Wellesley in 1831, and of Mr. Lechmere Charlton in 1837, and the reports of the Committee of Privileges.—Com. Journ. vol. 86, p. 701, vol. 22, p. 3, *et seq.* In 1873, Mr. Whalley and Mr. Guildford Onslow, members of Parliament, were reprimanded and heavily fined by the Court of Queen's Bench for a contempt of court in connection with the celebrated 'Tichborne case:' and on the 23 Jan. 1874, Parliament not then being in session, Mr. Whalley was committed by the same court for a contempt. He was discharged from custody before the 26th, on which day Parliament was dissolved. On the meeting of a new Parliament the Lord Chief Justice addressed a letter to the Speaker informing him of the facts, and a Committee on Privilege, to whom the letter was referred, reported that it did not demand the further attention of the House. Hansard, Deb. ccxviii. 52, 108; Report of Parl. Committee, 1874; May, Parl. Prac. [158].

[4] May, Parl. Prac. [160].

should exercise the franchise; and it became the constant practice to omit boroughs which had been in the recent habit of electing members, and to return upon the writ, 'There are no more cities or boroughs within my bailiwick.' There is some excuse for the Sheriffs in the fact that the boroughs for the most part were anxious to be omitted, so as to escape the burthen of paying the wages of their members, and frequently set at naught the writ ordering an election, by sending no return.[1] But the discretionary power of the Sheriffs was often abused by them for the purpose of influencing the elections and falsifying the returns, either at the instigation of the Crown or of great local magnates.[2] Several statutes were from time to time passed to prevent these malpractices. So early as the reign of Edward I., the Statute of Westminster I. (3 Edw. I. c. 5) declared that elections ought to be free, and forbade any disturbance of their freedom. In the 5th of Richard II. an Act was passed imposing a fine on Sheriffs who should neglect to make a return to Parliamentary writs, or omit from such return any city or borough which was bound and formerly accustomed to send members to Parliament.[3] A statute of the 7th Henry IV. (1406), made 'on the grievous complaints of the Commons of the undue election of the knights of shires for Parliament,' regulated the time and manner of electing knights, and provided for a true return by the Sheriff of the result of the election, by requiring the names of the members to be written in an

Attempt to restrain the abuse by statute.

Statutes of 1406;

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[1] The town of Torrington, in Devonshire, even obtained a charter of exemption from sending burgesses to Parliament.—Hallam, Midd. Ages, iii. 115.

[2] In 1312 Matthew Crauthorne complained that the Sheriff of Devon, instead of returning him, a duly elected member, had returned members not chosen by the Commons of the county. (Palgrave's Parl. Writs, II. ii. 138.) In 1386, the bailiffs of Barnstaple, in reply to writs ordering them to pay £6 8*s.* as the expenses of John Henrys, one of their representatives in the Parliament of Oct. 1385 (9 Ric. II.), excused themselves on the double ground, that he was not an inhabitant of the County of Devon nor having any property therein, and that James de Chuddelegh, the Sheriff of Devon, had returned the said John without their assent or knowledge, at the motion of the said John and his friends, for the sake of gain. Return of Members of Parliament 1213–1702 (Printed by authority of Parliament, 1879), p. 225.

[3] 5 Ric. II. st. ii. c. 4.

indenture, authenticated by the seals of the persons who had elected them.[1] An Act, passed four years later
1410; (11 Hen. IV.), gave the Justices of Assize power to inquire into the legality of returns, and inflicted the penalty of one hundred pounds on any Sheriff who should return a
1445. member not duly elected.[2] In the 23rd year of Henry VI. (1445), a further attempt was made to check abuses by an Act which gave an additional penalty, upon a false return, to the party aggrieved, and required every Sheriff duly to deliver a proper precept to the mayor and bailiff of each city or borough in his shire, to elect representatives for Parliament, and every mayor and bailiff to make a true return of the members chosen.[3]

The cognisance of Election disputes was originally vested in the King and his Council. The first instance of the intervention of the Commons in such matters occurred under Richard II., whose reign was so fruitful in Constitutional precedents.

First intervention of the Commons in election disputes, temp. Ric. II.

In 1384 (7 Ric. II.) the borough of Shaftesbury presented a petition to the King, Lords, *and Commons*, complaining of a false return by the Sheriff of Dorset, and praying them to order remedy.[4] In the 5th Henry IV. (1404) the Commons prayed the King and Lords in Parliament that an improper return by the Sheriff of Rutland might be examined *in Parliament*, and exemplary punishment inflicted in case of default found. The Lords thereupon sent for the sheriff and for William Ondeby, the knight returned, as well as for Thomas de Thorp, who had been duly elected, and having examined into the facts of the case, directed the return to be amended by the insertion of Thorp's name in lieu of Ondeby's, and committed the Sheriff to the Fleet till he should pay a fine at the King's pleasure.[5] In a subsequent case, in the 18th

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[1] 7 Hen. IV. c. 15.
[2] 11 Hen. IV. c. 1.
[3] 23 Hen. VI. c. 14.
[4] Prynne, Reg. iv. 261. The result of this petition is not stated.
[5] Rot. Parl. iii. 530; Hallam, Midd. Ages, iii. 110.

Henry VI. (1439), where the Sheriff of Cambridgeshire had failed to make any return, the Commons are not even named, but the matter was determined by the King and the Lords.

Under Edward IV., Henry VII., and Henry VIII. there is no record of any interference on the part of the Commons; but the imperfect state of the rolls and journals of Parliament during these reigns renders this negative testimony of little weight. In the first year of Queen Mary, the Journals of the Commons record the appointment of a Committee 'to inquire if Alexander Nowell, prebendary of Westminster, may be of the House.' On the following day they reported that 'Alexander Nowell, prebendary in Westminster, and thereby having a voice in the Convocation house, cannot be a member of this House, and the Queen's writ to be directed for another burgess in his place.'[1]

Nowell's case, 1553.

The next case was that of the county of Norfolk, in 1586. On account of some irregularity in the first return, the Chancellor had issued a second writ for this county, and a different member had been elected. The circumstance having been noticed in the House of Commons, Queen Elizabeth directed the Speaker to express her displeasure that 'the House had been troubled with a thing impertinent for them to deal with, and only belonging to the charge and office of the lord chancellor, whom she had appointed to confer with the judges about the returns for the county of Norfolk, and to act therein according to justice and right.' The House, however, appointed a Committee to investigate the circumstances, who reported in favour of the election under the first writ. While intimating that they had reason to believe that the Chancellor, and some of the Judges, held the same opinion as themselves, the Committee declared that 'they had not thought it proper to inquire of the chancellor what he

Case of the county of Norfolk, 1586.

[1] Com. Journals, 1 Mary, p. 27.

had done, because they thought it prejudicial to the privilege of the house to have the same determined by others than such as were members thereof. And though they thought very reverently of the said lord chancellor and judges, and knew them to be competent judges in their places; yet in this case they took them not for judges in Parliament in this house: and thereupon required that the members, if it were so thought good, might take their oaths and be allowed of by force of the first writ, as allowed by the censure of this house, and not as allowed of by the said lord chancellor and judges. Which was agreed unto by the whole house.'[1]

Case of Goodwin and Fortescue, 1604.

James I., in the Proclamation summoning his first Parliament, attempted to exercise a wide control over Parliamentary elections, specifying the kind of men who were to be elected, and specially forbidding the choice of 'bankrupts and outlaws.' All returns were to be filed in Chancery; and any found contrary to this Proclamation were to be rejected as unlawful and insufficient, and the constituencies fined. Any person elected contrary to the Proclamation was also to be fined and imprisoned.[2] The question soon came to an issue. Sir Francis Goodwin was elected for the county of Buckingham; but the Clerk of the Crown refused to receive the return on the ground that Goodwin had been outlawed some years before, and Sir John Fortescue, a member of the Privy Council, was elected by virtue of a second writ. The Commons, on the matter being brought under their notice, voted that Goodwin was duly elected, and ordered him to take his seat. The Lords requested a conference on the subject, which the Commons at first refused, but afterwards acceded to, on being informed that the request was made at the King's special desire. They justified their decision as to Goodwin, by alleging that owing to some technical informalities, he was not legally an outlaw, and that even if he were, they

[1] D'Ewes, Journal, 393; Hallam, Const. Hist. (7th ed.) i. 275.
[2] Parl. Hist. i. 967.

could prove by precedents that outlaws had sat in the House. The King, in his reply, going beyond the immediate question, took the opportunity to enunciate a doctrine utterly subversive of the free constitution of Parliament. 'He had no purpose,' he said, 'to impeach their privilege, but *since they derived all matters of privilege from him, and by his grant*, he expected that they should not be turned against him.' He then maintained that legally the House had no right to meddle with returns, which were made into the Court of Chancery, and were within its exclusive jurisdiction. He further denied their assertion that outlaws might legally sit, and requested them to confer with the Judges. In face of the King's challenge of all the privileges of the House, involving as it did the vital question of its independence of or subjection to the Royal will, it was impossible for the Commons to give way on the main point of jurisdiction. But they acted with that combined firmness and reasonableness which in so many Constitutional crises has characterised the political action of the English nation. They gave up the minor point, by bringing in a Bill to disable outlaws in future from sitting in Parliament, but they refused to confer with the Judges, affirming that they themselves had always decided in cases of disputed elections. Two days later, after a further message from the King, in which he professed great regard for their privileges, declared himself distracted in judgment on the question in dispute, and desired and commanded as an absolute King, that there should be a conference with the Judges in the presence of his Council, the Commons gave way on the question of form. The conference with the Judges, however, never came off. In an interview between the King himself and the Committee who had drawn up the reply of the House, James admitted that the Commons were the proper judges of the returns, but requested, as a personal favour, that the return of both Goodwin and Fortescue should be set aside and a new writ issued. To this the House assented, but to satisfy the scruples of certain members a letter was obtained from Goodwin expressing his concurrence in the arrange-

ment.[1] The apparent compromise was in effect a victory for the Commons, whose right to decide upon the legality of returns, and the conduct of returning officers in making them, was thenceforth regularly claimed and exercised. It was fully recognised as their exclusive right by the Court of Exchequer Chamber in 1674,[2] by the House of Lords in 1689,[3] and also by the Courts of Law in 1680[4] and 1702.[5] Their right was further recognised by the Act 7 William III. c. 7, which declared that 'the last determination of the House of Commons concerning the right of elections is to be pursued.'

Case of *Ashby* v. *White*, 1702.

The claim of the Commons to determine, not merely the legality of elections, but the rights of the *electors* as well, gave rise, in 1702, to a memorable contest between the Lords and Commons. One Ashby, a burgess of Aylesbury, having been refused permission to vote at an election, brought an action at common law against William White and others, the returning officers of that borough. He obtained a verdict; but it was moved in the Court of Queen's Bench, in arrest of judgment, 'that this action did not lie,' and, contrary to the opinion of Lord Chief Justice Holt, judgment was entered for the defendant; a decision which was afterwards reversed, on a writ of error, by the House of Lords, on the grounds upon which Chief Justice Holt had based his dissent in the Court below. Upon this the Commons, after lengthy debates, passed resolutions affirming that 'the determination of the right of election of members to serve in Parliament is the proper business of the House of Commons, which they would always be very jealous of, and this jurisdiction of theirs is uncontested; that they exercise a great power in that matter, for they oblige the officer to alter his return according to their

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[1] Commons' Journ. i. 149–169; Parl. Hist. i. 993–1017; S. R. Gardiner, Hist. of Eng. 1603–1616, i. 185–188.
[2] *Barnardiston* v. *Soame*, 6 Howell, St. Tr. 1092.
[3] *Ibid.* 1119.
[4] *Onslow's case*, 2 Ventris, 37.
[5] *Frideaux* v. *Morris*, 2 Salkeld, 502.

judgment; and that they cannot judge of the right of election, without determining the right of electors; and if electors were at liberty to prosecute suits touching their right of giving voices, in other courts, there might be different voices in other courts, which would make confusion, and be dishonourable to the House of Commons; and that therefore such an action was a breach of privilege.' On the other side it was objected, as set forth in the judgment of the House of Lords, that 'there is a great difference between the right of the electors and the right of the elected: the one is a temporary right to a place in Parliament, *pro hac vice;* the other is a freehold or a franchise. Who has a right to sit in the House of Commons may be properly cognisable there; but who has a right to choose, is a matter originally established, even before there is a Parliament. A man has a right to his freehold by the common law, and the law having annexed the right of voting to his freehold, it is of the nature of his freehold, and must depend upon it. The same law that gives him his right must defend it for him, and any other power that will pretend to take away his right of voting may as well pretend to take away the freehold upon which it depends.'[1]

Case of '*the Aylesbury men.*'

Shortly after the decision of the House of Lords, upholding the claim of Ashby against the returning officers, five other burgesses of Aylesbury, afterwards familiarly known as 'the Aylesbury men,' commenced similar actions against the constables of their borough. They were thereupon committed to Newgate by the House of Commons for a contempt of its jurisdiction. They endeavoured to obtain their discharge on writs of *habeas corpus*, but without effect, the majority of the Judges holding that the Commons were the sole judges of their own privileges. The Commons further declared the counsel, agents, and solicitors of the plaintiffs guilty of a breach of privilege,

[1] Report of Lords' Committee, 27th March, 1704, upon the conferences in the case of *Ashby and White;* Hatsell, vol. iii. App.; 14 St. Tr. 695–888.

and committed them also. The 'Aylesbury men' then applied for a writ of error, in order to bring the decision of the Judges refusing the *habeas corpus* before the House of Lords; but the Commons resolved that no writ of error lay in this case, and petitioned the Queen not to grant it. On the other hand, the Lords addressed the Queen, pointing out that writs of error are writs of right, *ex debito justitiae* (a contention which was upheld by ten out of the twelve Judges, when appealed to by the Queen for their advice), and prayed that the writ might be granted. At length the Queen put an end to the unseemly contest by a prorogation of Parliament, which at once set the 'Aylesbury men' and their counsel at liberty. No longer impeded by the interposition of privilege, and supported by the judgment of the House of Lords, the plaintiffs proceeded with their actions, and obtained verdicts and execution against the returning officers.[1]

The exclusive jurisdiction of the Commons in matters of election, which, for the sake of their own independence, they had insisted on and obtained, became subsequently prostituted to the purposes of party, and this abuse reached its greatest height under George II. and George III.[2] The evil was remedied as far as possible by the Acts of Mr. Grenville in 1770, and of Sir Robert Peel in 1839; but to the last the constitution and proceedings of Election committees 'too often exposed them to imputation of political bias.' At length, in 1868, the trial of controverted elections was transferred to [the] Judges of the superior Courts of Law,[3] thus recurring to the method adopted more than 450 years previously in the Election statute of 11 Henry IV.

The county franchise enjoyed by all freeholders.

It was under the Lancastrian dynasty that the first statutes were passed regulating the qualifications of Par-

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[1] *Reg.* v. *Paty* (one of the 'Aylesbury Men'), 2 Lord Raymond, 1109.

[2] See May, Const. Hist. i. 362–369. 'The struggle between Sir Robert Walpole and his enemies was determined in 1741—not upon any question of public policy—but by the defeat of the Minister on the Chippenham Election Petition.'—*Ibid.* p. 364.

[3] 31 & 32 Vict. c. 125.

liamentary electors and of persons to be elected. It is probable that from the first introduction of county representation, but certainly as early as the year 1254,[1] the knights of the shire were elected, not merely by the knights or tenants *in capite*, but by all the freeholders of the county assembled in the County Court.[2] In the 'Good Parliament' of 1376 the Commons, in their anxiety to prevent the malpractices of the sheriffs, appear to have attempted to restrict the electoral body in counties. They petitioned that knights of the shire might be chosen by common election of *the better folk of the shires*, and not nominated by the sheriff without due election. Edward III. replied that the knights should be elected by common assent of the *whole county*.[3] The earliest statute regulating their election, 7th Henry IV. c. 15 (1406),[4]—which, having been enacted in answer to a complaint of the Commons of 'undue' election, may be taken to be declaratory and confirmatory only of the existing custom—places the franchise upon a very popular basis, so as to include not only all freeholders, but all freemen present at the County Court on the day of election. It was enacted 'that at the next county [court] to be holden after the delivery of the writ, proclamation should be made, in full county [court], of the day and place of the Parliament, and that *all they that be there present, as well suitors duly summoned for the same cause as others*, shall attend to the election of the knights for the Parliament; and then, *in full county*, they shall

At its maximum under Henry IV.

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[1] *Supra*, p. 241.

[2] [That all the Freeholders did give suit of County Court in 12th and 13th centuries is categorically denied by Mr. J. H. Round in *Arch. Rev.* ii. 66, Art. *The Suitors at the County Court*, following, but enlarging upon, the thesis of Mr. F. W. Maitland, in *Eng. Historical Review* for July, 1888, in Art. under same title. Mr. Round's conclusion is, *op. cit.* p. 69, bluntly stated to the effect that 'no Freeholders, *as such*, were suitors of the County Court.' This, being simply a flat contradiction of the older view which found expression in the original text of the present work, is not capable of being reconciled with it, and no such attempt will here be made, nor any change in the text, the present Editor not being convinced that the Freeholders ever lost their right of attendance by any statute, whatever may have been the facts as regards the frequency of such attendance.—ED.]

[3] Rot. Parl. ii. 355; Stubbs, Const. Hist. ii. 433.

[4] *Supra*, p. 349.

First disfranchising statute, 8 Hen. VI. c. 7.

Forty shilling freeholders.

proceed to the election, freely and indifferently, notwithstanding any request or command to the contrary.'[1] But in 1430 (8 Henry VI.) was passed a very remarkable measure, —the first disfranchising statute on record,—by which the qualification of County electors was restricted to freeholders, and of them to such only as 'have free land or tenement to the value of forty shillings by the year at least, above all charges;' with power to the Sheriff to examine each elector on oath as to the annual value of his property. Allowing for the change in the value of money, this was equivalent to a real property qualification of from thirty to forty pounds annual value, and must have disfranchised not merely all landless freemen, but a very large number of the smaller freeholders. The County franchise, which had reached its maximum by the time of Henry IV., was now reduced to its minimum. The reactionary tendencies of the times are disclosed in the recital in the Act of the reasons which were thought to render it necessary. It complained that elections of knights of shires had of late been made 'by very great, outrageous, and excessive number of people dwelling within the same counties, of the which most part was people of small substance and of no value, whereof every of them pretended a voice equivalent, as to such elections to be made, with the most worthy knights and esquires dwelling within the same counties,—whereby manslaughters, riots, batteries, and divisions among the *gentlemen and other people* of the same counties shall *very likely* rise and be [it is not said that they had actually occurred] unless convenient and due remedy be provided.'[2]

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[1] The language of the Act is not free from ambiguity; and some have regarded it as conferring an extension of the suffrage. (See Homersham Cox, Ancient Parliamentary Elections, 105.) Stubbs, however (Const. Hist. iii. 406) maintains, (and his contention is supported by the natural inference from the petition of the Commons in 1376 together with the King's answer) that 'before the close of the reign of Edward III. the whole body of persons assembled made the election whether they were legal suitors or not,' and that the Act of 1406 introduced no alteration.

[2] 8 Hen. VI. c. 7.

Besides fixing a property qualification for voters, this statute also required that both the electors and the elected should be actually resident in the county. This had already been insisted on in 1413, as to both counties and boroughs, by a statute of Henry V.;[1] and another statute in 1432 (10 Hen. VI. c. 2) ordained that the land which gave the vote should be situate within the county. The restrictions as to residence seem to have been generally evaded as early as the reign of Edward IV.; and the statute of Henry V., having proved 'almost a solitary instance in the law of England wherein the principle of desuetude has been avowedly set up against an unrepealed enactment,' was at length repealed by the 14th George III. c. 58.[2]

Both electors and elected required to be resident.

Repealed by 14 Geo. III. c. 58.

The Act of 1445 (23 Hen. VI.) has been already referred to in reference to the restraints put upon the malpractices of the Sheriffs; but it is more important on account of one

Knights of the shire required to be of gentle birth, by stat. 23 Hen. VI. c. 14.

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[1] 1 Hen. V. c. 1.

[2] Hallam, Midd. Ages, iii. 119. In *Onslow* v. *Ripley*, 1781, the Court of King's Bench resolved that 'little regard was to be had to that ancient statute, 1 Hen. V., *because the common practice of the kingdom had been ever since to the contrary.*'—Peckwell, Reports of Contested Elections, i. 53, note D.

In the reign of Elizabeth, in 1571, a Bill was introduced in the Commons to repeal, as to boroughs, the ancient statute of Henry V. and legalise the innovation which time had brought about. The Bill appears to have been dropped, but it gave rise to an interesting debate which has been preserved in the pages of D'Ewes' Journal. The supporters of the Bill argued the question on its merits, asserting that a man could not be presumed to be wiser for being a resident burgess, and that the whole body of the realm, and the service of the same, was rather to be respected than any private regard of place or person. 'This,' observes Hallam, 'is a remarkable, and perhaps the earliest assertion, of an important constitutional principle, that each member of the House of Commons is deputed to serve not only for his constituents but for the whole kingdom; a principle which marks the distinction between a modern English Parliament and such deputations of the estates as were assembled in several continental kingdoms; a principle to which the House of Commons is indebted for its weight and dignity, as well as its beneficial efficiency, and which none but the servile worshippers of the populace are ever found to gainsay.' Those who defended the existing law, and appeared anxious to restore it to vigour, urged that the inferior ranks using manual and mechanical arts ought, like the rest, to be regarded and consulted with on matters which concerned them (an argument which has been revived in the present day in favour of working-men candidates for Parliament). But the chief mischief dwelt upon as resulting from non-resident borough members was the interference of noblemen in elections in favour of nominees. Some members proposed to impose a fine of £40 on any borough making its election on a peer's nomination.—See D'Ewes, p. 168; and Hallam, Const. Hist. i. 266.

of its provisions, which attempted to establish not only a property qualification for members, but also a qualification of gentle birth, contrary to that important Constitutional principle,—the legal equality of all freemen below the peerage,—which has exercised so beneficial an influence over the English nation. It would seem that the knights of the shire, who had long ceased to be in all cases knights in the strict sense of the term, were sometimes not even gentlemen by birth, and it was now enacted, that henceforth the county representatives should be 'notable knights of the same counties for which they shall be chosen, or otherwise such notable esquires, *gentlemen born*, of the same counties as shall be able to be knights; and no man to be such knight which standeth in the degree of a yeoman (*vadlet*) or under.'[1]

Valetti in Parliament.

[1] In 1322 (16 Edw. II.) eight Knights of the Shire returned to the Parliament which met in November have the word *valettus* against their names in the enrolment of the writs *de expensis*. They are: for Devon, Richard Chissebych; Worcestershire, John de Stone; Herefordshire, John de Brugge and Philip de Canvouwe; Leicester, Robert de Gaddesby and William Jaunvill; Middlesex, Richard Duraunt and William le Rous. The exact meaning of the term 'valettus' at this date is doubtful. In 1445 it was clearly synonymous with 'yeoman,' and so it would appear to have been in 1397, when 'vadletz appellez yomen' are complained of in Haxey's Bill (*supra*, p. 318), and are, by a statute of the same year (20 Ric. II. c. 2, apparently founded on Haxey's complaint), restrained, as well as all others, 'de meindre estat,' from wearing the 'livery of company' pertaining to any lord. 'Valet' or 'vadelect' seems to have originally denoted honourable service. Selden (Tit. of Honour, fol. 831) speaks of it as being anciently a name specially denoting young gentlemen, even though of great descent or quality, but as subsequently given to persons of the rank of yeomen. A 'yeoman' is defined by Sir Tho. Smith (Rep. Anglor. lib. i. c. 24) as he whom our law calls *legalis homo*, a free-born man that may dispend of his own free land in yearly revenue to the sum of forty shillings. But it had also a more general application, denoting, like 'valet,' a higher kind of service, which still survives in the current phrase to do 'yeoman's service.' In the household of the mediæval knight or baron the younger sons of yeomen would form a large proportion of the servitors, and share with the younger sons of knight or squire the common name of *valetti*. The yeomen, too, who lived on their own land, but wore the 'livery of company' of some baron or lesser territorial magnate, would also be his 'valets.'

Yeomen.

The mediæval 'yeoman' was the tenant of land in free socage. The extent of his holding might be large or small. From the year 1278, if it amounted to £20 annual value, he was liable, like the tenant in chivalry, to be compelled to take up knighthood; a burthen from which he was nominally relieved by the statute *De Militibus* in 1307. (*Supra*, p. 163.) Gentle birth constituted then as now a social distinction, but had as yet received no legal recognition. If a freeholder below the rank of peerage were not a knight, or an esquire, he would, we apprehend, have been classified as a yeoman, 'gentleman' not having yet be-

The property qualification thus established was considerable, the amount of land which made its owner

Property qualification of members.

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come a designation of legal status. It was not till the 27 Edw. III. (1353) that the words '*gentilis homo*' were adjudged a good addition (Cowell's Interpreter, *s. v.* 'gentleman'): and both 'esquire' and 'gentleman' are rarely found before the stat. 1 Hen. V. c. v. (1413) which required the addition, in original writs and other legal processes, of the 'estate, degree or mystery' of the defendant. In the 25 Hen. VI. (1447) the members returned for Surrey were: 'John Stanley, squyer,' and 'William Weston, gentylman.' (Parl. Return, 1879, p. 337.) A hundred and twenty years previously Weston would probably have been described as *valettus* or 'yeoman.' Some of the *valetti* returned in 1322 may, however, have been early instances of county representation by members who were socially as well as legally of yeoman status. Down to 1324 the writs required the election of actual knights, but these were not always obtainable: and as early as 1311, two *homines*, Ralph de Bellafago and Nicholas de Burton were returned for Rutlandshire. (Palgrave's Parl. Writs, ii. pp. 1, 51.) But they were probably not of a lower social grade than that of the ordinary county member. N. de Burton sat again in 1315, and 1318; and William de Burton, *miles*, was member in 1353 and 1357. A John de Bellafago was returned in 1327 and 1328, and Roger de B. in 1338 and 1341. (Return of Members of Parl. 1213-1702.) In 1324 the Parliamentary writs directed the return of two knights 'or others.' (Parl. Writs, II. i. 317.)

Gentlemen.

Esquires.

An examination of the recent Parliamentary Return of Members, already cited, gives evidence that most of the eight *valetti* of Nov., 1322, were of the class from which county members were usually drawn. The name of 'Ricardus de Chissebech, *miles*,' occurs as one of the members for Devon in the Parliament which met in May of the same year, 1322. The *valettus* of this name in the Nov. Parliament could scarcely have been the same person, but was clearly of the same family, probably a son or other relative, who being neither a knight nor an esquire was properly designated *valettus* or yeoman. Ric. de Chissebech was also member in 1316, -19, -23 and -24; R. de C., *miles*, in 1318, Jan. & Oct. John de Stone, the Worcestershire *valettus* of 1322, appears also as member for that county in 1320, and subsequently in 1323, and in six other years down to 1339. Of the Herefordshire *valetti*, John de Brugge does not appear as a member either before or after 1322, but he is stated in Burke's Extinct Peerage to have been a grandson (Collins, Peerage, ed. 1756, says "the eldest son") of Sir Simon de Brugge (Bruges or Brydges) of that county, and ancestor of the Dukes of Chandos. Philip de Canvouwe occurs again in 1337 as 'Clanvou.' [Cf. Thos. de Clanvowe, Kt., 1410, Cal. Lambeth Wills, *Genealogist*, v. 326.] Robert de Gaddesby was member for Leicestershire in 1319, and again in 1327. The name of 'Jaunvill' does not again occur, but it has not a plebeian sound. It was probably a various spelling of 'Genevill,' a baronial family of the 14th century. Of the two remaining *valetti*, William le Rous was again member for Middlesex in 1324, and was evidently related to the Richard le Rous, who sometimes with the addition of *miles* and sometimes without, sat for that county in nine Parliaments from 1297 to 1313. The name of Richard Duraunt does not appear again, and he may not improbably have been of the yeoman class. The names of William 'Tornegold' and Richard 'Tulusan' which appear as members for Middlesex, '*loco militum*,' in 1319 (Parl. Return, p. 58) seem indicative of a mercantile element in the county representatives. [John Tornegold was Sheriff of London, 43 Edw. III., and John Tolesan, 21 & 33 Hen. III., Gairdner's *Three Fifteenth Cent. Chron.*, Camd. Soc. 1880, pp. 35, 36, 46.—Ed.]

[Ducange, *Gloss.*, Paris. 1840–50, *s. v.*, cites Hoveden, 783, 'De Dominabus et de Valectis et puellis . . . in donatione Domini Regis,' in proof that *valetti* were 'magnatum filii qui necdum militare cingulum erant consecuti.' In Rot.

eligible for knighthood being estimated at £20 annual value, equivalent to at least £300 a year at the present time. The celebrated statute of Queen Anne—passed to correct the evils of bribery caused by the candidature of rich commercial men without local connexions—excluded all but landowners from the House of Commons, the qualification being fixed at £600 a year for county, and £300 a year for borough, members,[1] which was to be exclusively derived from freehold or copyhold estate.[2] This invidious and unjust law was maintained until 1838, when the monopoly of the landowners was surrendered, and personal property was admitted as a qualification.[3]

Abolished in 1858.

At length, in 1858, the law of property qualification, having been systematically evaded from its first establishment, was abolished altogether.[4] There is only one recorded instance in which the oligarchic provision of Henry VI.'s statute, that knights of the shire should be of gentle birth, was alleged as a disqualification against a parliamentary candidate, and this occurred six years after the law was passed.[5] But it would be very rare during

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Parl. i. 267, 33 Edw. I., a list of the Sheriffs for Scotland contains this entry: 'De Pebbles, Robert Hastangs, Vallet', Visc.' It is worth remarking in confirmation of what has been said above, that nearly all the other Sheriffs on the list are described as 'mons.,' *i. e.*, they were knights.—ED.]

[1] The members for the Universities were excepted.

[2] 9 Anne, c. 5. A Bill to the same effect passed both Houses in 1696, but William III. withheld the Royal assent.

[3] 1 & 2 Vict. c. 48.

[4] 21 & 22 Vict. c. 26.

[5] In 1450 (29 Hen. VI.) there was a contested election for Huntingdonshire. Robert Stonham and John Styuecley (or 'Stucle'), 'notabiles armigeri,' who had sat for the county in several preceding Parliaments, were opposed by a certain Henry Gymber, who was probably the candidate of the yeomen or smaller freeholders and stood in much the same position as a tenant-farmer candidate at the present day. He secured 70 votes, but the old members polled 424, and in the end were duly returned by the Sheriff. The under-sheriff, however, had endeavoured to put in force the provisions of the Act of 1430 as to the examination of electors on oath, and Gymber's supporters threatened a riot; whereupon 124 of the principal freeholders who had voted for Stonham and Styuecley, fearing lest the Sheriff should be induced to make a false return, forwarded a statement of the facts to the King, setting forth the numbers of the votes on each side, and objecting, further, to the return of Gymber, on the ground that he was not 'of gentell berthe.'—Prynne's 3rd Register, p. 157; Return of Members of Parliament, 1213–1702 (1879), pp. 336, 338, 342, 344; and see Stubbs, Const. Hist. iii. 409, 423.

the reactionary period upon which England had now entered, that other than men of aristocratic birth should be returned as county members. The servility of Parliament during the Tudor period was in no small degree owing to the political corruption, for which the limited constituencies introduced by Henry VI. afforded every facility.

Borough elections.

In boroughs, prior to the passing of the Act of Queen Anne above referred to, no other qualification was required in the members except that imposed by 1 Henry V. c. i., that they should be 'citizens and burgesses *resiant*, dwelling, and *free*, in the same cities and boroughs.' The question, Who were the original electors in boroughs? has been the subject of much controversy, and scarcely admits of a positive and general answer, owing to the infinite variety of local electoral customs which municipal records, so far as they have yet been explored, disclose. Mr. Serjeant Merewether and Mr. Stephens, however, in their learned work on the 'History of Boroughs,' have adduced very cogent evidence to show that originally the elective franchise was enjoyed by all burgesses, that is, by all the free inhabitant householders paying scot and bearing lot, and sworn and enrolled at the court leet of the borough. The 'court leet' or 'burghmoot,' was the 'folkmoot' of the borough, just as the 'shiremoot' was the 'folkmoot' of the shire. Those householders only who bore their share of the burthens of the place, who paid *scot* and bore *lot*, were entitled to the privilege; those who, from poverty or other cause, did not pay the charges, nor serve the public offices of the borough, were not 'burgesses,' and therefore excluded.[1] But whoever may have been the original electors, —whether the scot and lot householders, the tenants in

[Question,] Who were the electors in boroughs.

[1] [In *Lib. Assis.*, 18, Y. B. 38 Edw. III.,] the persons entitled to be citizens of London were decided to be 'those who were born and heritable in the same city by descent of inheritance, *or* who were *resiants and taxable* to scot and lot.' The latter is the most general description, and as the former would include all who had heritable houses, so would the latter include all other resident householders who were of free condition.—Merewether and Stephens on Boroughs, Introd. xxvi.

burgage, the freeholders generally, or the freemen,—very few boroughs retained their electoral system unaltered for any length of time; all were subject to the changes arising from the development of local custom, and the tendency of such development was generally towards a restriction of the franchise.[1] On receipt of the writ for the election of county and borough representatives, it was the Sheriff's duty to issue his precept to the cities and towns in his county; and it was customary for delegates, appointed by their fellow-burgesses for the purpose, to attend in the County Court and there either to report the choice of the borough, or themselves to elect the members to serve in Parliament. Gradually various select bodies of burgesses, by whatever names distinguished, usurped the power, and by long usage acquired a kind of prescriptive right, of election. By the end of the 15th century these select bodies had in many places substituted self-election for the suffrages of the whole body of the burgesses. Hitherto these encroachments on the rights of the town populations had gone on in each borough independently and spontaneously, deriving their sanction solely from the binding force of particular local custom. But from the accession of the House of Tudor, the rights of the inhabitants of boroughs were subjected to renewed and more rigid restrictions, through the charters of municipal incorporation which now began to be granted by the Crown.[2] With the privilege of incorporation was usually combined the gift, or revival, of the right of sending representatives to Parliament. This right was in many cases exclusively vested in the municipal governing body (the Mayor and Town Council) which, as a rule, was nominated in the first instance by the

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[1] On the very difficult subject of the mediæval borough electorate, for which the published materials are as yet too imperfect for thoroughly accurate generalization, see further in Stubbs, Const. Hist. iii. 413–421.

[2] The *first* charter of municipal incorporation was granted in the reign of Henry VI. [On Municipal Government, see the work by Bazalgette and Humphreys, 1885, and for a recent French view of English municipal history, see M. Alexandre Dehaye, *Les Municipalités Anglaises* (Paris, Cotillon, 1883), reprinted from the *Annuaire de Législation Etrangère* for 1883.—ED.]

Crown, and afterwards maintained by self-election. The direct influence of the Crown and the nobility over many municipalities was secured by the creation of the office of high steward which, being held by some local territorial magnate, practically placed the borough representation in his hands. Thus, 'for national, as well as local purposes,' it has been well observed, 'the burgesses were put beyond the pale of the constitution. The power of the Crown and aristocracy was increased at the expense of the liberties of the people. The same policy was pursued by the Stuarts; and the two last of that race violated the liberties of the few corporations which still retained a popular constitution after the encroachments of centuries.'[1] Residence was at first, as we have seen, an essential qualification for a burgess, whether as member or elector; but when the practice of electing non-resident members had been introduced, in open defiance of the Parliamentary writ and the statutes of the realm, non-resident electors were also admitted. This was extensively resorted to at the restoration of Charles II., when, under the Act of the 13th year of that reign, the resident corporators were expelled from their offices by the King's Commissioners, and the great officers of State and other persons introduced in their stead.

Although these usurpations were in some places corrected after the Revolution, yet in others they were improperly continued and sanctioned by legal authority. By these various means the right of voting in cities and boroughs became generally restricted, either to the Mayor and Town Council, or to that body and its own nominees, the freemen; and by the growth of an infinite variety of local usages, which, though in many cases not really ancient, were judicially recognised as such, the electoral, as well as the municipal, system of boroughs became greatly changed from its primitive popular character.[2] The mass

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[1] May, Const. Hist. iii. 279; *Case of Quo Warranto*, 1683, St. Tr. viii. 1093; New modelling the Corporations, 1687, Hallam, Const. Hist. iii. 74.

[2] Sir Erskine May (Const. Hist. iii. 276) has pointed out the remarkable

of abuses and anomalies was at length swept away by the Reform Act of 1832,[1] and the Municipal Corporations Act of 1835.[2] Finally, in 1867, the ancient system of household suffrage, with certain restrictions, which cannot be regarded as in any way more stringent than those which originally existed, was re-established.[3]

History of Regencies.

Henry VI. was only nine months old when he succeeded to the throne. His long minority, and the mental imbecility which he evinced on reaching manhood, rendered his reign practically a perpetual Regency. Nominally, a Protector of the kingdom was only appointed at Henry's accession, and on two other occasions, once when the King was specially afflicted by his malady, and again in 1455, when, after the first battle of St. Alban's, the Duke of York was stretching forth his hand towards the Throne. The

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parallel existing between the general political history of the country and the history of local government, both in boroughs and parishes: 'While the aristocracy was encroaching upon the popular power in the government of the state, it was making advances, no less sure, in local institutions. The few were gradually appropriating the franchises which were the birthright of the many; and again, as political liberties were enlarged, the rights of self-government were recovered. Every parish is the image and reflection of the state. The land, the church, and the commonalty share in its government; the aristocratic and democratic elements are combined in its society. The common law, in its grand simplicity, recognised the right of all the rated parishioners to assemble in vestry and administer parochial affairs. But in many parishes this popular principle gradually fell into disuse; and a few inhabitants—self-elected and irresponsible—claimed the right of imposing taxes, administering the parochial funds, and exercising all local authority. This usurpation, long acquiesced in, grew into a custom, which the courts recognised as a legal exception from the common law. The people had forfeited their rights, and select vestries ruled in their behalf.' A partial remedy for this abuse of parochial government was applied by Mr. Sturges Bourne's Act in 1818 (58 Geo. III. c. 69), and by Sir John Hobhouse's Vestry Act (1 & 2 Will. IV. c. 60) in 1831. [Cf. *Vestries or Parish Councils*, Lond. 1890, by J. T. Dodd, M.A., who urges still further reforms.—ED.]

[1] 2 & 3 Will. IV. c. 45.

[2] 5 & 6 Will. IV. c. 76, amended by 22 Vict. c. 35.

[3] The Reform Act of 1867 (30 & 31 Vict. c. 102) admitted to the borough franchise *all male occupiers of dwelling-houses* (of full age) who have resided for twelve months on the 31st July in any year, and have been *rated* to the poor rates as ordinary occupiers, and have, on or before the 30th of July, *paid* such rates up to the preceding 5th January. It also admitted *lodgers* who have occupied for the same period lodgings of the annual value, unfurnished, of £10. [The Representation of the People Act, 1884, seems to us to leave little logical ground for the retention of the lodger franchise, as there is, in perhaps nine cases out of ten, no appreciable distinction between the 'lodger' of previous legislation and the 'inhabitant occupier' of the Act of 1884.—ED.]

action of Parliament with reference to the question of Regency forms an interesting point in Constitutional history. During the temporary absence from the realm of our Norman and early Angevin kings, the government of the kingdom devolved officially on the Chief Justiciar, and from the reign of Henry III. it became common to appoint Lords Justices, or *custodes regni*—usually by Royal authority only.[1] But these appointments scarcely fall within the stricter sense of the term 'Regency,' which connotes the infancy or other natural incapacity of the reigning King. Owing probably to the ancient Elective character of the English kingship, the Common Law makes no provision for the case of an infant King, who, in judgment of law, can never be a minor, and has therefore no legal guardian.[2] But *pari passu* with the gradual establishment of Hereditary succession to the Crown, the National Council, besides altering the course of succession as occasion required, began to exercise the power of vesting the Royal authority, during the infancy or other incapacity of the reigning prince, in a Protector, Guardian, or Council of Regency. There are fifteen instances in English history of the appointment of a Regency, either actual or prospective, each of which demands some notice, and may be here conveniently considered in chronological order.

Fifteen instances of a Regency.

1. After the hasty coronation of Henry III., who at his father's death was only nine years old,[3] a Council of the prelates and barons who adhered to the young King was summoned to meet at Bristol a fortnight later. By common assent they committed the care of the King and Kingdom to William, Earl of Pembroke, the Earl

Henry III. 1216.

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[1] This practice was revived after the death of Mary II. in 1695, when Lords Justices, consisting of the principal officers of State and the Archbishop of Canterbury, were appointed to carry on the government during William III.'s absence from the realm on his foreign expeditions.

[2] Co. Lit. 43. Sir Edward Coke reasons thus: 'In judgment of law the King, as King, cannot be said to be a minor: for when the royall bodie politique of the King doth meete with the naturall capacity in one person, the whole bodie shall have the qualitie of the royall politique, which is the greater and more worthy, and wherein is no minoritie.'

[3] *Supra*, p. 148.

Marshal, with the title of *Rector Regis et Regni.* With the Marshal was specially associated the Legate Gualo, and the Bishop of Winchester (Peter des Roches);[1] but his powers were practically limited by the advice of the baronage generally.

Edward I. 1272.

2. In 1271, prior to Henry III.'s death, an arrangement had been made for the guardianship of the realm during his son's absence. In accordance with this, on the day after the King's decease, the Great Seal was delivered to Walter Giffard, Archbishop of York (the see of Canterbury being vacant), who, with the assistance of Roger de Mortimer, a baron, and Robert Burnell, one of the Royal clerks, carried on the Government until Edward's return in August, 1274.[2] Their powers were confirmed in the National Assembly which met at Westminster on the 14th of January, 1273, and swore allegiance to the absent king.[3]

Edward III. 1327.

3. After the deposition of Edward II. and the election and coronation, on the 29th of Jan. 1327, of his eldest son Edward,[4] then of the age of fourteen, the Parliament, which had been in session since the 7th of January, proceeded to provide for the Government of the Kingdom. For this purpose they appointed a standing Council, 'a sort of parliamentary regency' as it has been termed, consisting of four bishops, four earls and six barons, with the King's cousin Henry, Earl of Lancaster, at their head, to advise the King in all matters of Government.[5]

Richard II 1377.

4. Richard II. was only eleven years old at the date of his accession. But however incapable naturally of exercising sovereign authority, he was regarded as in the legal enjoyment of it, and no Regent was appointed. The Great

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[1] Walt. Covent. ii. 233. Matt. Paris, [Chron.] Maj. [Rolls ed., III. p. 2, only W. Marshal.—ED.].

[2] Seventh Report of Dep. Keeper of the Public Records (1846), App. ii. 259; Royal and other Letters of reign of Henry III., Rolls Series, ii. 346; Stubbs, Const. Hist. ii. 103, 104.

[3] *Supra*, p. 214. Qui omnes in præsentia dominorum W. scilicet archiepiscopi Eboracensis, R. de Mortuomari, et R. Burnell clerici, *qui in loco domini Edwardi regis Angliae praefuerunt*, sacramentum eidem domino Edwardo tanquam terræ principi præstiterunt. Ann. Winton. 113.

[4] *Supra*, p. 218.

[5] Rot. Parl. ii. 52; Knyghton, col. 2556.

Seal, according to the subtle reasoning of the lawyers of that age, was supposed to possess a sort of magical influence rendering any government legal. The day after his grandfather's death, Richard received the Seal from the hands of its keepers, and delivered it to his uncle, John of Gaunt, Duke of Lancaster, for safe custody. Four days afterwards it was handed over to the Bishop of St. David's, who was thus enabled to legalise all acts of the Government. But although no Regent was appointed, the House of Lords nominated a Council of twelve, composed of two bishops, two earls, two barons, two bannerets, and four knights, without whose concurrence no measure was to be carried into effect. This Council was modified from time to time by Parliament, which itself acted as 'a great council of regency' during the earlier years of Richard's reign.[1]

Henry VI. First Regency. 1422.

5. At the accession of Henry VI. (1 Sept. 1422) far more regularity and deliberation were shown in supplying the defect in the Executive authority. Henry V. on his death-bed had expressed a wish that his younger brother Humphrey, Duke of Gloucester, should act as Regent in England, while his other brother John, Duke of Bedford, conducted the Government in France.[2] But this disposition was disregarded by the Parliament. On hearing of the late King's death, several of the Lords spiritual and temporal, chiefly members of the old Council, met together, and provided for the exigencies of government by issuing commissions to Judges, Sheriffs, and other officers, to continue in the exercise of their respective duties, and also writs for a new Parliament. This was opened on the 9th of November by the Duke of Gloucester, as Commissioner appointed in the King's name, with the consent of the Council, under

[1] Rot. Parl. iii. 386; Hallam, Midd. Ages, iii. 186.

[2] Gesta Hen. Quinti, [Eng. Hist. Soc.] 159; but see J. de Waurin, [1399–1422, Rolls ed.] 423. [There is a sharp difference between the two Chroniclers. *Angliæ . . . protector et defensor sit frater meus dux Glocestriæ*, is the language used in *Gest. Hen. V.*, while *Waurin* makes Henry commit England to his uncle, Exeter, and France to Bedford, if the Duke of Burgundy should refuse it.—Ed.] The fact that the truth of Gloucester's assertion was answered [only] by a denial of the King's right to dispose of the governance of the kingdom by testament, affords a strong presumption that such assertion was correct.

the Great Seal; and at once proceeded to ratify all the acts of the peers who had taken on themselves the administration and summoned the Parliament. Some weeks later it is recorded in the rolls that the King, 'considering his tender age and inability at present to direct in person the concerns of his realm, by the assent and advice of the Lords spiritual and temporal, and of the Commons, ordains and constitutes (after he shall have returned to England and so long as he shall remain in the kingdom, and it shall please the King) his uncle the Duke of Bedford, now in parts beyond sea, and during his absence the King's other uncle the Duke of Gloucester, now in England, to be *protector and defender* of the kingdom and English church, and the King's chief counsellor.' Letters patent were afterwards passed to this effect, but the tenure of the office was expressly limited to the King's pleasure. Sixteen counsellors were afterwards appointed in Parliament to assist the Protector in the administration, with an almost unlimited power of veto on the removal and appointment of officers.[1]

The nature and extent of the powers committed to the Protector may be learnt from the written answer of the Lords to a request of the Duke of Gloucester, in the Parliament of the sixth year of Henry's reign (1427-8), that he might be informed what authority he possessed as Protector and defender of the realm and the King's chief counsellor. After reminding the Duke that at first he had desired 'to have had the governance of this land, affirming that it belonged unto you of right, as well by means of your birth as by the last will of the King that was, your brother, whom God assoile; alleging for you such grounds and motives as it was thought to your discretion made for your intent; whereupon the Lords spiritual and temporal assembled there in Parliament. . . . had great and long deliberation and advice, searched precedents of the governail of the land in time and case semblable, when kings of this

[1] Rot. Parl. iv. 169–176; and see Hallam, Midd. Ages, iii. 186.

land have been tender of age, took also information of the laws of the land of such persons as be notably learned therein, and finally found your said desire not caused nor grounded in precedent nor in the law of the land; the which the King that dead is, in his life nor might by his last will nor otherwise alter, change, nor abrogate, without the assent of the Three Estates, nor commit or grant to any person governance or rule of this land longer than he lived.' And that nevertheless 'it was advised and appointed by authority of the King, assenting the three Estates of this land, that ye, in absence of my lord your brother of Bedford, should be chief of the King's Council, and devised therefore unto you a name different from other counsellors, not the name of Tutor, Lieutenant, Governor, nor of Regent, nor no name that should import authority of governance of the land, but the name of Protector and Defensor, the which importeth a personal duty of entendance to the actual defence of the land, as well against enemies outward, if case required, as against rebels inward, if any were, that God forbid; granting you therewith certain power, the which is specified and contained in an Act of the said Parliament, it to endure as long as it liked the King.' The Lords then proceed to exhort and require the Duke 'to content you with the power above said and declared, of the which my lord your brother of Bedford, the King's eldest uncle, contented him; and that ye none larger power desire, will, nor use; giving you this that is above written for our answer to your foresaid demand, the which we will dwell and abide with withouten variance or changing.'[1] From these proceedings it appears to have been already recognised as Constitutional law: (1) That the King does not possess the power of nominating a Regent during the minority of his successor; and (2) that neither the heir presumptive, nor any other person, is entitled to exercise the Royal prerogative during the King's infancy (or, by parity of reasoning, his infirmity); but that

[Principles of Constitutional Law recognised, 1427–8.]

[1] Rot. Parl. iv. 326.

the sole right of determining the persons by whom, and the limitations under which, the Executive government shall be conducted in the King's name and behalf, resides in the great council of Parliament.[1]

Henry VI Second Regency. 1454.

6. In 1454 (32 Henry VI.), it having been reported to the House of Lords by a deputation of twelve peers who had waited upon the King, that his mental derangement was such that they 'could get no answer nor sign' from him, the Lords 'elected and nominated Richard, Duke of York, to be protector and defender of the realm of England during the King's pleasure,' with powers similar to those which had been formerly conferred upon the Duke of Gloucester. An Act of Parliament was subsequently passed, constituting the Duke of York protector of the Church and Kingdom and the King's chief counsellor during the Royal pleasure, or until the Prince of Wales (then under two years old) should attain years of discretion, on whom the said dignity was immediately to devolve.[2] In less than a year the King became slightly better, and at once annulled the Duke of York's protectorate. Hitherto the Lords had assumed the exclusive right of choosing the Protector, the Commons being merely assenting parties to the Act which ratified his election. But on the next occasion, the Commons—who were for the most part strong partisans of the White Rose—took a much more active part, and would appear to have forced the Lords unwillingly to re-appoint the Duke of York.

Henry VI. Third Regency. 1455

7. The King being a prisoner in the hands of the Yorkists, after the first battle of St. Alban's, was obliged to appoint the Duke his lieutenant to open Parliament in November, 1455. The Commons immediately proposed to the Lords that 'whereas the King had deputed the Duke of York as his commissioner to proceed in this Parliament, it was thought by the Commons that, if the King hereafter could not attend to the protection and

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[1] Hallam, Midd. Ages, iii. 189.
[2] Rot. Parl. v. 240–243.

defence of the land, an able person should be appointed protector, to whom they might have recourse for redress of injuries.' While the Lords were considering the matter the Commons, two days afterwards, repeated their request; and after they had left the chamber, the Chancellor declared that 'it is understood that they will not further proceed in matters of Parliament to the time that they have answer to their desire and request.' Having a third time pressed for an answer, the Commons were at length informed that 'the King our sovereign lord, by the advice and assent of the Lords spiritual and temporal being in this present Parliament, had named and desired the Duke of York to be protector and defensor of this land.' In the act of ratification the Duke was to hold his office not 'during the King's pleasure,' as formerly, but 'until he should be discharged of it by the Lords in Parliament.'[1] Before the end of February, 1456, the King had once more recovered his reason, and resumed the personal exercise of the Royal functions.[2]

Edward V 1483.

8. On the accession of Edward V. at the age of thirteen, the Queen-mother claimed and endeavoured to obtain the Regency, but the Duke of Gloucester (afterwards Richard III.) having marched to London and secured the person of the King, was appointed by a Great Council of prelates, nobles, and chief citizens, 'protector of the King and kingdom.'

Regency Act, 28 Hen VIII. c. 7, 1536.

9. By statute 28 Henry VIII. c. 7, it was provided that the successor to the throne, if a male and under eighteen, or if a female and under sixteen, should be until such age in the government of his or her natural mother (if approved by the King), and of such other councillors as the King by letters patent or by his will should appoint; and the King accordingly appointed his sixteen executors to constitute the Privy Council, and exercise the authority of the Crown, until his son Edward VI. should attain the

[1] Rot. Parl. v. 284-290; Hallam, Mid. Ages, iii. 192.
[2] Rot. Parl. v. 321.

age of eighteen. By these executors the Earl of Hertford (afterwards Duke of Somerset), the King's maternal uncle, was appointed Protector of the realm and guardian of the King's person. This arrangement, though contrary to the late King's will, was confirmed by the assent of the Lords spiritual and temporal; and shortly afterwards the Protector procured a grant of his office, with almost unlimited powers, by letters patent from the young King.[1]

Regency Act, 24 Geo. II. c. 24. 1751.

10. No other instance of appointing a Regent occurred till the year 1751, when, after the death of Frederick, Prince of Wales, an Act was passed appointing the Princess Dowager of Wales to be guardian and regent, in case the Crown should descend to any of the children of Frederick, Prince of Wales, under the age of eighteen years. A Council of Regency was also nominated by the Act; but the King was empowered to add four other members by instrument under his sign manual, to be opened after his death.[2]

George III. First Regency Act, 1765.

11. The proceedings during the reign of George III., have a special importance as recent precedents. In 1765 an alarming illness led the King to consider the necessity of providing for a Regency in case of his death. At first he wished Parliament to confer upon him the unconditional right of nominating any person as Regent whom he might select.[3] But by the Regency Act, as ultimately passed, the King was empowered to nominate, under his sign manual, either the Queen, the Princess Dowager of Wales, or any descendant of George II. residing in this kingdom, to be guardian of his successor (while under eighteen years of age) and 'regent of the kingdom.' A Council of Regency was appointed by the Act, which also defined its powers and those of the Regent.[4]

Proceedings on the king's illness in 1788.

12. On two occasions during the illness of George III., in 1788—9, and again in 1810, the name and authority

[1] Burnet, ii. 4, 15.
[2] 24 Geo. II. c. 24.
[3] Walpole's Mem. ii. 98.
[4] 5 Geo. III. c. 27.

of the Crown—through the means of letters patent under the Great Seal affixed by the authority of both Houses of Parliament—were used for the purpose of opening Parliament when the King was personally incapable of exercising his Constitutional functions. In 1788, in the discussions concerning the appointment of a Regent, Mr. Fox 'advanced the startling opinion that the Prince of Wales had as clear a right to exercise the power of sovereignty during the King's incapacity as if the King were actually dead; and that it was merely for the two Houses of Parliament to pronounce at what time he should commence the exercise of his right.'[1] Mr. Pitt, however, firmly maintained the absolute right of Parliament to make what provision it thought fit for carrying on the government, and the Duke of York, in the House of Lords, disclaimed the right on behalf of the Prince, who 'understood too well the sacred principles which seated the House of Brunswick on the throne, ever to assume or exercise any power, be his claim what it might, not derived from the will of the people, expressed by their representatives and their lordships in Parliament assembled.'[2] A Regency Bill was introduced in the Commons and sent up to the Lords, but the King's sudden recovery put a stop to all further proceedings. In 1810, when the King was seized with his last mental disorder, the proceedings of Parliament were grounded generally upon the precedent of 1788. An Act was ultimately passed—the Royal assent being given by commission under the Great Seal authorised by a resolution of both Houses—by which the Prince of Wales was empowered to exercise the Royal authority as Regent, in the name and on behalf of the King, but subject to many important limitations, particularly specified.[3]

Second Regency Act in 1810.

13. By the statute 1 William IV., c. 2, the late Duchess of Kent was appointed guardian and Regent in the event of

Regency Act, 1 Will IV., 1830.

[1] May, Const. Hist. i. 177.
[2] Parl. Hist. xxvii. 678, 684.
[3] For a short but comprehensive summary of the important proceedings relative to the Regency under Geo. III. see May, Const. Hist. i. 175–215.

her present gracious Majesty coming to the throne before attaining the age of eighteen years; and, contrary to former precedents, no provision was made for a controlling council, but the Regent was left to carry on the government through the responsible Ministers of the Crown, and to act upon their advice alone.

First Regency Act of Queen Victoria, 1837.

14. On the accession of her Majesty, the King of Hanover became presumptive heir to the throne, and an Act was passed providing that in the event of the Queen's decease, while her successor was out of the realm, the government should be carried on in his name by Lords Justices until his arrival.[1]

Second Regency Act, 1840.

15. The last occasion on which Parliament exercised its powers of appointing a Regent was on the Queen's marriage, in 1840. An Act was passed by which, in the event of any child of her Majesty succeeding to the throne under the age of eighteen, Prince Albert, as the surviving parent, was appointed Regent, without any Council of Regency, or any limitation upon the exercise of the Royal prerogatives,—except an incapacity to assent to any bill for altering the succession to the Throne, or affecting the uniformity of worship in the Church of England, or the rights of the Church of Scotland.[2]

From this general view of the history of Regencies we must now return to the particular period of which this chapter more especially treats.

Parliament, under Edward IV. and Richard III., has no history.

Under Edward IV. and Richard III., Parliament has no history. The nobility, thinned by civil war and the hands of the executioner, and split up into contending factions, were unable to offer any political resistance to the power of the Crown. The Commons, by themselves, were as yet unequal to the contest. Under Edward IV. both Lords and Commons, instead of contending, like their predecessors, for the establishment of rights and the redress of grievances, were subservient to the Royal will. His was

[1] 1 Vict. c. 72.
[2] 3 & 4 Vict. c. 52.

the first reign in which no public remedial statute was passed, nor even a petition presented similar to those with which we have seen the Commons, in former reigns, approaching the throne.[1] For five years, from January, 1477, to November, 1483, no Parliament was summoned,—a suspension of the National Council without example since 1327. In money matters Edward appears to have made himself, as far as possible, independent of Parliamentary grants. He derived a very large income from the numerous forfeited estates of his enemies; and all the feudal dues and the customs duties on merchandise were exacted with the greatest rigour. He also extorted frequent tenths from the clergy, and, discarding the specious appellation of 'loans,' by which former Kings had endeavoured to disguise the forced contributions of their subjects, he compelled the richer classes to make apparently voluntary gifts, under the new and less plausible name of *benevolences*. As already mentioned, no complaint of any kind appears in the Parliamentary records of his reign; but it is evident from a passage in the remarkable Address presented to Richard, Duke of Gloucester, when invited, in 1483, to assume the Crown, that the nation, though hitherto silent, had not been insensible to the illegality. 'For certainly wee be determined,' say the authors of the Address, 'rather to aventure and com[m]itte us to the perill of oure lyfs and jopardye of deth, than to lyve in suche thraldome and bondage as we have lyved long tyme heretofore, oppressed and injured by Extorcions and newe Imposic[i]ons, ayenst the Lawes of God and Man, and the Libertee, old Police and Lawes of this Reame, wheryn every Englishman is enherited.'[2] Accordingly, in Richard III.'s only Parliament, Benevolences were declared by statute to be for ever illegal.[3]

[1477–1483, no Parliament.]

Benevolences.

Our consideration of the growth of Constitutional

Sir John Fortescue s

[1] In Edward IV.'s last Parliament, in 1483, the Commons ventured to make some complaints with respect to the wearing of liveries, the maintenance of the public peace, and one or two other topics. Rot. Parl. vi. 198.

[2] Rot. Parl. [vi.] 241.[—Ed.]

[3] 1 Ric. III. c. 2.

testimony to the freedom of the Constitution.

government during the 15th century may be appropriately closed by a quotation which 'no writer on the English constitution,' says Hallam, 'can be excused from inserting.' Sir John Fortescue, Chief Justice of the King's Bench under Henry VI., in his treatise 'De Laudibus Legum Angliae,' written for the instruction of that King's young son Edward, Prince of Wales, gives the following exposition of the nature of the English kingship:—'A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely regal, he would have a power to make what innovations and alterations he pleased in the laws of the kingdom, impose tallages and other hardships upon the people whether they would or no, without their consent, which sort of government the civil laws point out, when they declare Quod principi placuit legis habet vigorem. But it is much otherwise with a king whose government is political, because he can neither make any alteration or change in the laws of the realm without the consent of the subjects, nor burden them against their wills with strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely, and without the hazard of being deprived of them, either by the king or any other. The same things may be effected under an absolute prince, provided he do not degenerate into the tyrant. Of such a prince, Aristotle, in the third of his Politics, says, 'It is better for a city to be governed by a good man than by good laws.' But because it does not always happen that the person presiding over a people is so qualified, St. Thomas, in the book which he writ to the king of Cyprus, De Regimine Principum, wishes that a kingdom could be so instituted as that the king might not be at liberty to tyrannize over his people; which only comes to pass in the present case; that is, when the sovereign power is restrained by political laws. Rejoice, therefore, my good prince, that such is the law of the kingdom which you are to inherit, because it will afford, both to yourself

and subjects, the greatest security and satisfaction.' And again: 'As the head of a body natural cannot change its nerves and sinews, cannot deny to the several parts their proper energy, their due proportion and aliment of blood; neither can a king, who is the head of a body politic, change the laws thereof, nor take from the people what is theirs by right against their consent. Thus you have, sir, the formal institution of every political kingdom, from whence you may guess at the power which a king may exercise with respect to the laws and the subject. For he is appointed to protect his subjects in their lives, properties, and laws; for this very end and purpose *he has the delegation of power from the people*, and he has no just claim to any other power but this.'[1]

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[1] De Laudibus Legum Angliae, cc. 9, 13. See also his treatise on Absolute and Limited Monarchy, and 'De Natura Legis Naturæ.' Two centuries previously, Bracton, writing under Henry III., had borne very similar testimony to the limited nature of the English kingship: 'Rex autem habet superiorem, Deum, s. Item legem, per quam factus est rex. Item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium, habet magistrum; et ideo, si rex fuerit sine fraeno, i. sine lege, debent ei fraenum ponere, nisi ipsimet fuerint cum rege sine fraeno.'—L. ii. c. 16, § 3.

[M. Duruy, *Hist. du Moyen Age*, Paris, 1864, p. 450, remarks that by the middle of the Fifteenth century the English people had in the Great Charter the declaration of their rights, and as its guarantees they had for individual liberty, Trial by Jury, for national liberty, the Parliament. M. Duruy also sets forth the difference between the contemporary movements towards national unity in England and in France at that period. 'On remarquera que tandis que l'Angleterre s'organisait pour marcher vers le noble but de la liberté politique, la France s'organisait pour arriver à une grande et forte monarchie où le roi s'élèverait seul au-dessus de tous. On aurait donc pu dès ce moment prévoir que le sentiment le plus vif de l'une serait la liberté, celui de l'autre l'égalité.' *Op. cit.* p. 456. M. Glasson, *Hist. du Dr. et des Inst. de l'Angl.*, iv. 84, thus sums up the position of the English monarchy at the close of the Fifteenth century. 'Ses pouvoirs sont considérables, immenses, et la royauté tentera plus tard de les élargir encore pour arriver à la monarchie absolue. Mais elle se heurtera à la volonté inébranlable de la nation qui saura faire respecter trois principes fondamentaux, déjà solidement établis . . . et qui forment les assises du régime parlementaire: le roi ne peut faire aucun acte législatif sans le consentement de son Parlement; il ne peut pas imposer de taxes sans le consentement de ce même Parlement; il est tenu de gouverner selon les lois du pays et s'il viole ces lois, ses agents et ses conseillers sont responsables.' By Parliament, M. Glasson here obviously means both Houses. On this period cf. *Three Fifteenth Century Chronicles* (Camden Soc. 1880), ed. by James Gairdner. In *Eng. Hist. Rev.*, 1890, pp. 259–63, M. C. V. Langlois urges the advantages of the comparative study of English and French History: 'two parallel histories in which nearly all the elements are symmetrical, which have in part a common origin and through the course of centuries have come frequently into contact.' This is precisely what has been set forth in the present Editor's notes.—ED.]

CHAPTER X.

THE TUDOR PERIOD. (1483—1603.)

REIGNS OF HENRY VII., HENRY VIII., EDWARD VI., MARY.

General characteristics of the Tudor Period.

THE Tudor period is almost synchronous with the 16th century, an age remarkable for its material prosperity, its Intellectual and Religious activity, and its Political retrogression. The mighty impulse given to Commerce by the discovery of America and of the passage to the East Indies by the Cape of Good Hope, coupled with the certainty imparted to the science of navigation by the use of the compass, caused an enormous increase of the wealth of the middle classes. Intent upon the acquisition of private gain, the merchants and traders were for the most part satisfied to leave questions of government to others, so long as they themselves were permitted to pursue their avocations in peace. Simultaneously with the extraordinary expansion of Commerce there were other causes at work which tended to withdraw men's minds from the consideration of purely political topics.

The revival of Learning, and its rapid dissemination among all classes through the medium of the printing-press, the profound religious agitation of the Reformation, and the spirit of bold enquiry which it excited concerning matters of the deepest interest hitherto generally accepted as beyond dispute,—all contributed to concentrate popular attention upon intellectual and religious progress, to the neglect of politics. On the continent of Europe, the introduction of standing armies, and the revolution in

the art of war which made it 'a distinct science and a distinct trade,' had emancipated rulers from the chief restraint on their power—the fear of an armed people—and enabled them to either utterly sweep away, or reduce to empty formalities, the national assemblies which had once been as free and as potent as our own early Parliaments. The free Constitutions of Castile and Arragon were successively overthrown by Charles V. and Philip II.; and the States-General of France, after languishing for a time, ceased altogether in 1614, until resuscitated in 1789, for their final meeting on the eve of the Great Revolution. In England, too, Parliamentary institutions passed through a season of trial. That they did not perish here as on the Continent, was mainly due to our insular position, which rendered the nation comparatively secure against foreign invasion, and thus obviated for a lengthened period the necessity of employing regular troops.[1] In a less degree the personal character of Henry VIII. was also instrumental in the preservation of our liberties. Tyrant as he was, he was yet animated by a scrupulous regard for the *letter* of the law. 'While his fellow-tyrants abroad were everywhere overthrowing free institutions, Henry was in all things showing them the deepest outward respect. Through his reign he took care to do nothing except in outward and regular legal form, nothing for which he could not shelter himself under the sanction either of precedent or of written law.' If he 'could get the letter of the law on his side he was satisfied; otherwise his conscience was uneasy.'[2] This peculiar character of Henry's tyranny, his anxiety to do everything in proper Parliamentary and Judicial form, 'while it degraded parliamentary and judicial institutions at the time, really did a great deal to strengthen

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[1] Macaulay, Hist. Eng. i. 34. Henry VII. had a small body-guard of 50 archers, and Hen. VIII. 50 horse-guards, each attended by an archer, demi-lance and coutelier, making 200 in all; but even this small force was, probably on account of the expense, soon given up.

[2] Freeman, Growth of Eng. Const. 101; Fortnightly Review, Sept. 1871, on 'The Use of Historical Documents.'

and preserve them for better days.'[1] The Parliament was indeed so disgracefully subservient and sycophantic that there was little temptation for the King to endeavour to destroy an institution which served to cover his most outrageous proceedings with a convenient and plausible appearance of popular approbation. When Henry had cut off Anne Boleyn's head on one day and married Jane Seymour the next morning, the Parliament gravely listened to a speech from the Lord Chancellor, assuring the world that the King did not do it 'in any carnal concupiscence,' and immediately proceeded to pass an Act declaring that it was all done 'of the King's most excellent goodness'![2] Such being the temper of the national representatives, it is not surprising to find Henry holding high their privileges, as in Ferrers's case,[3] or writing to the Pope, in 1529: 'The discussions in the English Parliament are free and unrestricted; the Crown has no power to limit their debates, or to control the votes of their members. They determine everything for themselves, as the interests of the Commonwealth require.'[4]

The reaction towards Absolutism which had set in during the latter part of Henry VI.'s reign, culminated under Henry VIII. 'We have got into a state of things,' observes Dr. Freeman, 'when Parliaments were ready to proscribe anybody, or to ordain anything, when judges were ready to declare anything to be the law, when juries were ready to find any verdict, when bishops and convocations were ready to declare anything to be true and orthodox, at the mere bidding of the capricious despot on the throne. We have reached the state which our fathers called *unlaw*, not the state when law is silent, but the state when law had turned about and become its own opposite, the state when the institutions which were meant to declare right, and truth, and

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[1] Freeman, Fortnightly Review, Sept. 1871.
[2] Speech of Lord Chancellor Audley in 1536, Lords' Journals, p. 84; 28 Hen. VIII. c. 7; Froude, Hist. Eng. ii. 503.
[3] *Supra*, 344.
[4] Froude, Hist. Eng. i. 187.

freedom, had been turned into engines of wrong, and falsehood, and bondage.'[1] Independently of the general political apathy to which allusion has been made, the extraordinary subservience of Parliament during the Tudor age, so unlike its demeanour at an earlier and at a later period, is to be accounted for by the fact that the old nobility, the leaders in former struggles for liberty, had been cut off in the Wars of the Roses, and the Commons had not yet acquired sufficient importance and self-reliance to act alone. The temporal Lords summoned by Henry VII. to the Parliament of 1485 were only 29 in number, and of these several were new creations. The new nobility which grew up under Henry VII. and his son owed everything to the Royal favour, and were restrained from independent action alike by gratitude, by interest, and by fear of the resolute vengeance which those monarchs unsparingly dealt out to all who opposed them. A watchful jealousy of all individuals likely to disturb their power was a characteristic of all the Tudor sovereigns. The nobles found safety and advancement by acting the part of courtiers rather than of Parliamentary barons. 'Henry VII.,' says Lord Bacon, 'kept a strait hand on his nobility; and chose rather to advance clergymen and lawyers, which were more obsequious to him, but had less interest in the people.' The same policy was pursued by Henry VIII. and Elizabeth. The remnant of the old nobility, the Percies, Nevilles, and Howards, were disgusted at the advancement of men like Wolsey, Cromwell, Cecil, Bacon, and Walsingham. The rebellion of the Earls of Northumberland and Westmoreland, in 1569, was as much a protest against the 'newe set-upp nobles,' as against the 'new-found religion' and the incarceration of Mary Queen of Scots, the representative of the ancient Faith.[2] At the same time the House of Commons,

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[1] Fortnightly Review, Sept. 1871.

[2] In their proclamation the rebels justified their proceedings on the ground that the Queen was surrounded 'by divers newe set-upp nobles, who not onlie go aboute to overthrow and put downe the ancient nobilitie of the realme, but also have misused the Queen's majestie's owne personne, and also have by the

under the restricted franchise introduced by the Act of Henry VI., consisted largely of nominees, servants and pensioners of the Crown. Under Henry VIII., Government interference with elections became a common practice, and in the reigns of Edward VI., Mary, and Elizabeth, petty boroughs were specially created in order to be corrupt. But the very fact that it was found needful to pack the House of Commons, and the anxiety which the Tudor monarchs generally displayed to secure the sanction of Parliament for all their proceedings, afford the strongest testimony to the real power and importance of the national assembly. Under Elizabeth, the Commons began to resume their firm tone and bearing, and thenceforth never desisted until they had won back their ancient liberties and established them on a sure foundation.

During the 120 years spanned by the Tudor dynasty, the Constitutional historian has scarcely any general progress of free principles, any important measure of improvement to record. The power of the Crown steadily increased until it acquired dangerous proportions; but it was usually exercised with discretion; and the want of a standing army acted as a perpetual restraint which did not indeed prevent the Crown 'from sometimes treating an individual in an arbitrary and even in a barbarous manner, but which effectually secured the nation against general and long-continued oppression.'[1] In the meantime, amidst the political lethargy of the great mass of the people, a silent transfer of power was taking place. The commercial wealth of the middle classes enabled them to buy up the estates of the old landed proprietors, and Feudalism gradually died out.[2] The persecution of the Puritans roused up a spirit

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space of twelve yeares nowe past set upp and mayntayned a new-found religion and heresie contrary to God's word.'—Lingard, Hist. Eng. viii. 45.

[1] Macaulay, Hist. Eng. i. 31.

The Law of Entail.

[2] The law of strict entail established by the Statute *De Donis conditionalibus* (13 Edw. I. c. 1, called also the Statute of Westminster the Second) endured for about 200 years. But in the 12th Edw. IV. a decision of the Judges in the celebrated *Taltarum's case* had restored the power of alienation by means of the collusive Judicial proceeding termed a *recovery*. Another mode of barring

of opposition to the Crown, and the struggle for Religious freedom led on to the vindication of Political freedom also. Under Elizabeth, opposition was restrained by her personal popularity, and by the feeling that a strong government was necessary amidst the perils to which both she and the nation were exposed from the Pope, from Spain, and from France; but this forbearance ended with the advent of the House of Stuart. At the commencement of the Tudor period England was a single kingdom, distracted and impoverished by a sanguinary civil war, with Scotland as a thorn in her side, and Ireland as a disturbed dependency. At the accession of the House of Stuart, she had reached the zenith of material prosperity, and assumed the position of a United Kingdom.

HENRY VII. 1485–1509.

The results of the protracted contest between the Crown and the people during the middle ages are thus concisely summed up by Hallam, in enumerating the essential checks upon the Royal authority existing at the accession of Henry VII. (1) 'The King could levy no sort of new tax upon his people, except by the grant of his Parliament, consisting as well of bishops and mitred abbots, or lords spiritual, and of hereditary peers or temporal lords, who sat and voted promiscuously in the same chamber, as of representatives from the freeholders of each county, and from the burgesses of many towns and less considerable places, forming the Lower or Commons' House. (2) The previous assent and authority of the same assembly were

Checks on the Royal authority.

Taxation.

Legislation.

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an estate tail, though not so effectually as by a recovery, was by a *fine*, a fictitious action, commenced and then compromised by leave of the court, and which barred all claims on the part of the issue not made within a year and a day afterwards. This power of barring future claims was taken from fines by statute 34 Edw. III. c. 13; but it was again restored, with an extension of the time of claim to five years, by the Act 1 Ric. III. c. 7, which was re-enacted in the Statute of Fines, 4 Hen. VII. c. 24. The deep designs attributed to Hen. VII., in procuring the passing of the Statute of Fines as a means of exalting the Royal authority upon the ruins of the aristocracy, have been shown by Hallam to be without foundation. (Const. Hist. i. 11.) The statute afforded, indeed, some slightly increased facilities for the alienation of land, by establishing a short term of prescription, but its efficiency as regards barring entails depended upon a Judicial construction of it in the 19 Henry VIII., confirmed by statute 32 Henry VIII. c. 36.

necessary for every new law, whether of a general or temporary nature. (3) No man could be committed to prison but by a legal warrant specifying his offence; and by an usage nearly tantamount to constitutional right, he must be speedily brought to trial by means of regular sessions of gaol-delivery. (4) The fact of guilt or innocence, on a criminal charge, was determined in a public court, and in the county where the offence was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made. Civil rights, so far as they depended on questions of fact, were subject to the same decision. (5) The officers and servants of the Crown, violating the personal liberty or other right of the subject, might be sued in an action for damages to be assessed by a jury, or, in some cases, were liable to criminal process; nor could they plead any warrant or command in their justification, nor even the direct order of the King.'[1] To these may be added, (6) The liability of the King's Ministers to be impeached by the Commons for misgovernment. This Constitutional right had not indeed been exercised since the reign of Henry VI., and lay dormant throughout the Tudor period, but it was dormant only, and with the revival of the spirit of liberty under James I. the right of Impeachment was re-asserted. Indeed, all these securities, though undoubtedly established by law, were more or less evaded in actual practice by the violent and unconstitutional acts of the Tudor sovereigns. 'The general privileges of the nation were far more secure than those of private men;' and on the whole 'there was perhaps, little effective restraint upon the government, except in the two articles of levying money and enacting laws.'[2]

Personal liberty.

Trial by jury.

Legal liability of the servants of the Crown.

Impeachment of Ministers [dormant under Tudors, revived *t.* Jac. I.].

Henry VII.'s laws.

Henry VII. has been eulogised by Lord Bacon as 'the best lawgiver to this nation since Edward I.' His laws are characterised by the same author as 'deep and not vulgar, not made upon the spur of a particular occasion for the

[1] Hallam, Const. Hist. i. 2.
[2] *Ibid.* i. 5.

present, but out of providence for the future, to make the estate of his people still more and more happy, after the manner of the legislators in ancient and heroical times.'[1] But this high praise is very inadequately supported by the actual facts. The laws of Henry VII. are few in number, and generally of small public interest. Only two among them—the statute for the security of the subject under a king *de facto*, and the statute by which a new court was erected reviving the authority of the Star Chamber—at all approach Lord Bacon's general description; and even these, though they had important effects in the future, evidently were enacted 'upon the spur of a particular occasion,'—namely, the necessity of providing for the security of his somewhat rickety throne.

Statute for the security of the subject under a King *de facto*. 1495.

By the first-named Act it was declared that 'no person attending upon the King and sovereign lord of this land *for the time being*, and doing him true and faithful service, shall be convicted of high treason by Act of Parliament or other process of law, nor suffer any forfeiture or punishment; but that every Act made contrary to this statute shall be void and of no effect.'[2] The attempt to bind future Parliaments was of course nugatory; 'for a supreme and absolute power cannot exclude itself; neither can that which is in its nature revocable, be made fixed.'[3] But from the passing of this statute it has been an accepted Constitutional maxim that 'possession of the throne gives a sufficient title to the subject's allegiance, and justifies his resistance of those who may pretend to a better right.' At the trial of the Regicides after the Restoration, some of them endeavoured to justify themselves under this Act by pleading that they had obeyed the Government which was in possession, and were therefore not traitors. The Judges, however, held that although this would have been a good defence for acts done by authority of a usurping King, it

[1] Bacon's Life and Reign of Henry VII.
[2] 11 Hen. VII. c. 1.
[3] Bacon's Henry VII. ii. 160.

would not avail to cover the proceedings of a non-regal government against one who was indicted and executed, being King. At the Revolution of 1688, the provisions of the Act were much relied upon in argument as a reason for accepting William III. as King, instead of establishing a Regency as suggested by Archbishop Sancroft and certain of the Tory party.[1]

Criminal jurisdiction of the court of Star Chamber revived. [3 Hen. VIII.]

Henry's attention was early directed to the prevention of conspiracies among the adherents of the House of York, by which his throne was perpetually threatened during the earlier portion of his reign.[2] The practice of 'maintenance' by which a number of individuals associated together under some powerful nobleman, whose livery they wore and to whom they were bound by oaths and promises, for the purpose of forcibly maintaining his and their own private quarrels, afforded a ready means of raising forces at short notice to assist the claims of any Pretender. Although prohibited by statute, this practice of giving liveries to numerous retainers had become general throughout the kingdom. With the view of effectually suppressing it, Henry procured the passing of the statute in the third year of his reign, by which the Criminal jurisdiction of the ancient *Concilium Ordinarium* exercised in the Star Chamber was revived and transferred to a new and specially constituted court.[3] The King's object was clearly explained to the Parliament by Morton, Archbishop of Canterbury, speaking on his behalf: 'His Grace (*i.e.* the King) saith, that it is not the blood spilt in the field that will save the blood in the city; nor the marshal's sword that will set this kingdom in perfect peace; but that

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[1] See Macaulay, Hist. Eng. ii. 356, 372.

[2] Hatred of the House of York was with Henry VII. a passion which even political considerations of expediency could hardly control. 'He never seemed to be weary,' says Mr. Campbell (Materials for Hist. of Hen. VII., Roll Series, Introd. xiii.) 'of branding the name of the Yorkists and their supporters with the gravest charges of rebelliousness and want of patriotism; and we shall see that the name of the late king is never mentioned by him without the favourite iteration of king "in dede but not in right." The state scriveners seemed to have received a standing order to introduce this hateful formula into every paper connected with Richard's name, however insignificant.'

[3] See *supra*, p. 193.

the true way is to *stop the seeds of sedition and rebellion* at the beginning, and for that purpose to devise, confirm, and quicken good and wholesome laws against riots and unlawful assemblies of people, and all combinations and confederacies of them by liveries, tokens, and other badges of factious dependence; that the peace of the land may, by these ordinances, as by bars of iron, be soundly bound in and strengthened, and all force, both in court, country, and private houses, be suppressed.'[1]

Exactions of Henry VII.

Henry VII. has been reproached with his insatiable avarice, but it is improbable that he amassed money merely for its own sake. As a clever and unscrupulous political adventurer, who had taken advantage of the disturbed state of the kingdom, after an exhausting and protracted civil war, to seize the throne by the aid of the Lancastrian faction, he had learnt the value and power of money as a means of buying future, and rewarding past support.[2] Taxation, moreover, was the one point which the mass of the people seem to have considered worth fighting about. Twice during his reign, when general subsidies were granted, formidable insurrections broke out; in 1488 in the North, under John à Chambre and Sir John Egremont; in 1497 in Cornwall, under Thomas Flammock, an attorney, and Michael Joseph, a farrier, who, with 16,000 followers, marched as far as Blackheath in Kent, and, having been joined by Lord Audley, engaged the King's troops, surrendering only after the loss of 2,000

Insurrections in 1488 and 1497.

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[1] Bacon's Henry VII. The speech of Morton is not found in the Rolls of Parliament, and was possibly invented by Bacon as representing what he considered ought to have been said. In any case, it accurately expresses the object of the statute passed.

[2] Notwithstanding his rigid and business-like economy, and his eagerness in the acquisition of wealth, Henry VII. was liberal in spending where an important object was to be gained. There is no parsimony apparent in the numerous grants made to men in every station of life who had assisted him in obtaining the throne. See 'Materials for a History of the reign of Henry VII.,' vol. i., A.D. 1485–6, edited by the Rev. W. Campbell, M.A., and published under the direction of the Master of the Rolls, 1873. The usual form of recital in these grants runs 'in consideracioun of the faithfull service which oure true subject and faithfull liegeman hath doone unto us, as wele beyond the see as on this side in oure moost victorious journay and triumphe, *and so during his lyfe entendeth to do heraftre.*'

killed, and 1,500 made prisoners.[1] Hence Henry deemed it politic to squeeze money out of the rich, and to avoid general impositions affecting the poorer classes. He first had recourse to Benevolences which, as we have seen, had been abolished in Richard III.'s only Parliament as an intolerable grievance. A Benevolence extorted by the King in the 7th year of his reign, received, four years later (1492), a kind of Parliamentary sanction by "a shoring or under-propping Act," making legally payable under pain of imprisonment, the arrears which private individuals had promised but not brought in.[2] The inquisitorial and arbitrary nature of the exaction appears from the statement of Lord Bacon that 'there was a tradition of a dilemma that Bishop Morton the Chancellor used, to raise up the benevolence to a higher rate; and some called it his fork, and some his crotch. For he had couched an article in the instructions to the commissioners who were to levy the benevolence, that if they met with any that were sparing, they should tell them that they must needs have, because they laid up; and if they were spenders, they must needs have, because it was seen in their port and manner of living; so neither kind came amiss.'[3] In addition to Benevolences Henry extorted large sums by suing for penalties under obsolete statutes, by rigorously exacting the extreme feudal rights of the Crown, and by employing the various processes of the courts of law, not for the dispensation of justice, but for the accumulation of fines and penalties. During the latter part of his reign he made use, for this purpose, of the notorious Richard Empson and Edmund Dudley,[4] 'lawyers in science and privy counsellors in authority, who turned law and justice into wormwood and

Benevolences.

Morton's Fork.

Other modes of raising money.

Empson and Dudley.

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[1] Lingard, Hist. Eng. v. 299, 314.

[2] 11 Hen. VII. c. 10. [Other Benevolences were levied in 1528 and 1545. Dowell, *Hist. of Taxation*, i. 202–3.—ED.]

[3] Bacon, *op. cit.* p. 121. [Claimed for Bp. Fox, *N. & Q.*, 7th S. ix. 443.—ED.]

[4] [Dudley was son of John Sutton, who assumed the name of Dudley, and who was second son of John, 4th Lord Dudley, K.G., (cr. 1342), representative of the Suttons, Lords of Sutton-upon-Trent. He married his ward, Elizabeth, daughter of Edward Grey, 1st Viscount Lisle (cr. 1483), and was by her father of John, Duke of Northumberland (cr. 6 Edw. VI., 1551).—ED.]

rapine.'[1] At the accession of Henry VIII. they were both committed to prison, tried, and executed, on a frivolous charge of treason. But, while sacrificing to popular resentment the agents of his father's extortions, the new King was careful to retain the fruits of their iniquity in his treasury.[2]

Parliament seldom summoned by Henry VII.

Throughout his reign of twenty-four years Henry VII. summoned Parliament only seven times, and during the last thirteen years only once, in 1504. To obtain money was the object on each occasion; but, like his predecessors, he submitted the expediency of his wars to the consideration and advice of the National Council. His first Parliament had granted him the duties on tonnage and poundage for life,[3] and the wealth which he amassed by the various means already referred to, by the attainder of the most opulent of the Yorkists, and by revocation, on his own sole authority, of all Crown grants made since the 34 Henry VI. (1454–5), rendered him the richest Prince in Christendom, and thus practically independent of Parliamentary control.

His riches made him practically independent of it.

HENRY VIII. 1509 1547.

The peculiar characteristics of Henry VIII.'s reign,—the subservience of Parliament, the real despotism of the King thinly disguised under Parliamentary and Judicial forms, the fair words uttered, the foul deeds done,—have been already referred to. On one point only—taxation—do we meet with an exception alike to the general servility of Parliament and to the general regard of the King for Constitutional formalities.

Taxation.

Henry's first Parliament granted him tonnage and poundage for life: but with a proviso 'that these grants be not taken in example to the Kings of England in time to come.'[4] Liberal subsidies were granted by the four follow-

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[1] Bacon's Henry VII. p. 217.

[2] In order to conciliate the nation, an Act (1 Hen. VIII. c. 3) was passed to correct the abuses which had prevailed in finding the King's title to land by escheat, and providing that all suits on penal statutes should be commenced within three years after the time of the alleged offence.

[3] Rot. Parl. 1 Hen. VII.

[4] 1 Hen. VIII. c. 20.

ing Parliaments for the prosecution of the war with France; but, in 1523, Wolsey took the indiscreet step of going to the House of Commons, and personally urging the grant of £800,000, an unprecedented sum, to be raised by a property tax of 20 per cent. on lands and goods. Many Members were inclined to resist his admission into the House, his presence there being evidently calculated to intimidate the Members, and thus silence all opposition. It was resolved however to admit him, and on the suggestion of Sir Thomas More, the Speaker, not with a few followers only, but 'with all his pomp, with his maces, his pillars, his pole-axes, his cross, his hat, and the great seal too.' The Cardinal made a long and eloquent oration in favour of joining the Emperor Charles V. in a war against France, and urged the grant of the sum demanded as the estimated cost of the expedition. But all the independent Members opposed a vigorous resistance. Wolsey came down to the House a second time, but the Commons received his harangue with silence; 'and when the minister demanded some reasonable answer, every member held his peace. At last the Speaker, falling on his knees, with much reverence excused the silence of the House, abashed, as he said, at the sight of so noble a personage, who was able to amaze the wisest and most learned men in the realm: but with many probable arguments he endeavoured to show the Cardinal that his coming thither was neither expedient, nor agreeable to the ancient liberties of that House;'[1] it being the usage of the Commons to debate only amongst themselves. After fifteen days' debate, a subsidy, much inferior in amount to that which the Cardinal had demanded, and payable by instalments in four years, was at length granted, mainly through the influence of the servants and dependents of the Crown holding seats in the House. 'I beseke Almightie God,' wrote a member of the Commons to the Earl of Surrey, 'it may bee well and peasibly levied, and surely payed unto the Kings grace, with oute

Wolsey's attempt to intimidate the Commons.

[1] More's Life of Sir T. More.

grudge, and specially with oute losyng the good wills and true herts of his subjects, which I rekene a ferre grettir treasure for a King then gold or silver. And the gentilmen which muste take paynes to levy this money among the Kings subjects, I think shalhave no little besynes about the same.'[1] This manifestation of an independent spirit among some of the Commons' House was agreeable neither to the King nor the Cardinal; and for nearly seven years Parliament was not again summoned.

Forced loans and Benevolences.

In the meantime recourse was had to forced loans and Benevolences. A forced loan had been already exacted in 1522, every man being required to swear to the value of his possessions, and to contribute a rateable portion according to such declaration, on the King's promise of repayment out of the next subsidy granted by Parliament.[2] In 1525, soon after the news of the battle of Pavia had been received, fresh Commissioners were appointed with instructions to demand the sixth part of the goods of the laity and the tenth part of the goods of the clergy, on the pretext that the King was about to lead an army into France. This demand was unanimously resisted. The Mayor and citizens of London on attempting to remonstrate were warned to beware, lest 'it might fortune to cost some their heads.' The clergy boldly stood upon their privilege to grant money only in Convocation; asserting that the Commission was contrary to the liberties of the realm, inasmuch as the King could take no man's goods without the authority of Parliament. By preaching and example they animated the people to resistance. 'When this matter was opened through Englande,' says the old chronicler Hall,

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[1] Ellis's Letters Illustrative of English History, i. 221.

[2] The form of these 'privy seals,' as the King's promises of repayment were called, ran: 'We Henry VIII. by the grace of God, King of England and of France, Defender of Faith, and Lord of Ireland, promise by these presents truly to content and repay unto our trusty and well-beloved subject, A. B., the sum of ———, which he hath lovingly advanced unto us by way of loan, for defence of our realm, and maintenance of our wars against France and Scotland: In witness whereof we have caused our privy seal hereunto to be set and annexed the ——— day of ———, the fourteenth year of our reign.'—MS. Instructions to the Commissioners, cited in Hallam, Const. Hist. i. 19. *'Privy seals.'*

'howe the greate men toke it was maruell, the poore curssed, the rich repugned, the light wittes railed, but, in conclusion, all people curssed the Cardinal, and his coadherentes as subversor of the Lawes and libertie of Englande. For thei saied, if men should geue their goodes by a Commission, then wer it worse then the taxes of Fraunce, and so England should be bond and not free.' The Royal Commissioners being forcibly resisted in several counties, and a serious insurrection having broken out in Suffolk, Henry was at length obliged to annul the obnoxious Commission, and 'the demaunde of money seased in all the realme, for well it was perceiued that the commons should none paie.'[1]

The forced loan having failed, recourse was now had to the more specious demand for a voluntary Benevolence. This being objected to by the citizens of London, as illegal under the statute of Richard III., the Judges were consulted, and gave answer that the statute, as the work of an usurper, was not binding on a lawful sovereign.

In 1544 another forced loan was exacted from all persons rated at £50 per annum; and in the following year a general Benevolence from all persons having land to the annual value of 40*s.*, or chattels worth £15. The Commissioners were instructed that 'if any one should withstand their gentle solicitations, alleging either poverty or some other pretence which the commissioners should deem unfit to be allowed, then, after failure of persuasions and reproaches for ingratitude, they were to command his attendance before the Privy Council, at such time as they should appoint, to whom they were to certify his behaviour, enjoining him silence in the mean time, that his evil example might not corrupt the better disposed.'[2] The consequence of refusing to contribute may be learnt from the

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[1] Hall, 696, 700.

[2] Lodge, Illustrations of British History, i. 711; Hallam, Const. Hist. i. 24.

oppressive treatment of two aldermen of London, Richard Reed and Sir William Roach. Reed was sent down to serve as a common soldier on the Scottish border, where the English army was then in the field, with special instructions to the General to employ him on the hardest and most perilous duty, and to 'use him in all things according to the sharpe disciplyne militar of the northern wars.'[1] Having been taken prisoner in the first engagement, the unhappy alderman was compelled to pay much more for his ransom than the Benevolence required of him. Sir William Roach received the milder punishment of imprisonment for three months, on a charge of uttering seditious words.[2]

Oppressive treatment of Aldermen Reed and Roach.

The forced loans were nominally secured, as we have seen, by the King's promises of repayment; but even this shadowy hope of reimbursement was taken away by the Acts of a servile Parliament. On two occasions the King was formally released from his debts. In 1529 a statute was passed by which the Parliament, 'for themselves and all the whole body of the realm which they represent, freely, liberally, and absolutely, give and grant unto the King's highness, by authority of this present Parliament, all and every sum and sums of money which to them and every of them is, ought, or might be due, by reason of any money, or any other thing to his grace at any time heretofore advanced or paid by way of trust or loan, either upon any letter or letters under the King's privy seal, general or particular, letter missive, promise, bond, or obligation of repayment, or by any taxation or other assessing by virtue of any commission or commissions, or by any other mean or means, whatever it be, heretofore passed for that purpose.'[3] When this release of the loan, Hall tells us, 'was knowen to the commons of the Realm, Lorde so they grudged, and spake ill of the hole Parliament; for

The King twice released from his debts by Act of Parliament.

[1] Lodge, Illustrations, p. 180.
[2] Lingard, vi. 347.
[3] 21 Hen. VIII. c. 24.

almoste euery man counted it his dette, and reconed suerly of the payment of the same, and therefore some made there wills of the same, and some others did set it ouer to other for debt, and so many men had losse by it, which caused them sore to murmur, but ther was no remedy.'[1] Again, in 1544, just after the exaction of a fresh loan, an Act was passed granting to the King all sums borrowed from any of his subjects since 1542, with a further provision that any money which his Majesty should have already paid in discharge of these debts, should be refunded by the creditor or his heirs.[2]

New treasons created by statute.

Under Henry VIII., the offence of High Treason was vexatiously and wantonly extended far beyond the limits marked out by the ancient statute of Edward III. It was made treason to dispute, and afterwards to maintain, the validity of the King's marriage with Anne Boleyn, or the legitimacy of her daughter Elizabeth. It was declared treason to marry without the Royal licence, or have a criminal intercourse with, any of the King's children 'lawfully born, or otherwise commonly reputed to be his children, or his sister, aunt, or niece;' or for any woman to marry the King himself, unless she were chaste, or had previously revealed to him her former incontinence. It was treason to wish by words to deprive the King of his title, name, or dignity, (including the title of Supreme Head on earth of the Church of England); to call the King a heretic, or schismatic, openly to wish him harm, or to slander him, his wife, or his issue.[3] The guilt of treason was even extended from deeds and assertions to the very thoughts of men. It was incurred 'by any person who should by words, writing, imprinting, or any other exterior act, directly or indirectly accept or take, judge, or believe, that either of the royal marriages, that with Catherine or that with Anne Boleyn, was valid, or who should protest

[1] Hall, 767.
[2] 25 Hen. VIII. c. 12.
[3] 25 Hen. VIII. c. 22; 26 Hen. VIII. c. 13; 28 Hen. VIII. c. 18; 32 Hen. VIII. c. 25; 33 Hen. VIII. c. 21.

that he was not bound to declare his opinion, or should refuse to swear that he would answer truly such questions as should be asked him on those dangerous subjects.'[1] 'It would be difficult,' says Lingard, 'to discover, under the most despotic governments, a law more cruel and absurd. The validity or invalidity of the two marriages was certainly matter of opinion, supported and opposed on each side by so many contradictory arguments, that men of the soundest judgment might reasonably be expected to differ from each other. Yet Henry by this statute was authorised to dive into the breast of every individual, to extort from him his secret sentiments upon oath, and to subject him to the penalties of treason, if those sentiments did not accord with the royal pleasure.'[2]

Illustrious victims.

The Earl of Warwick, only son of the Duke of Clarence, brother of Edward IV.; the Earl of Suffolk, nephew of that king; the Duke of Buckingham, also of Royal descent[3] and the first in rank and consequence among the nobility; the aged Countess of Salisbury, daughter of Edward IV. and mother of Cardinal Pole; Queen Anne Boleyn; Bishop Fisher; Sir Thomas More; Thomas Cromwell; the Earl of Surrey; and the Duke of Norfolk, ordered for execution but saved by the opportune death of the King, were among the most conspicuous victims to Henry's ferocious vengeance, policy, or caprice. The forms of law became the engines for the perpetration of judicial murders; the most trivial evidence was regarded as sufficient to support a conviction for treason; and during the latter part of Henry's reign even the few advantages which the accused possessed in the ordinary courts were taken away by the habitual employment of Bills of Attainder.[4] To obviate

Bills of Attainder.

[1] 28 Hen. VIII. c. 7; Lingard, vi. 372.

[2] Hist. Eng. vi. 372.

[3] [He was descended from Margaret Beaufort, sister of Henry and Edmund, Dukes of Somerset, great-grand-daughter of John of Gaunt and Catherine Swynford. See Table viii. in Bailey's *Succession to the Crown*.—ED.]

[4] *A Bill of Attainder* differs from an *Impeachment* thus: Impeachment is a judicial proceeding in which the Commons, 'the most solemn grand inquest of the whole kingdom,' are prosecutors, supporting their accusation by evidence, and the Lords are the sole judges. Attainder is a legislative act, which must pass through the same stages as any other Act of Parliament. It may be

all danger of refutation or of unpleasant disclosures, Cromwell, by the King's express command, enquired of the Judges whether, if Parliament should condemn a man to die for treason without hearing him in his defence, the attainder could ever be disputed. They replied that it would form a dangerous precedent; that Parliament should rather set an example to inferior courts by proceeding according to justice; but that the court of Parliament being supreme, an attainder in Parliament could never, under any circumstances, be subsequently questioned in a court of law.[1] By the irony of fate, Cromwell was himself the first to perish by an Act of Attainder hurried through Parliament without hearing him in his defence.

Accused persons not heard in their defence.

Act giving the King's Proclamations the force of law:

A remarkable example of the way in which Henry VIII. contrived to unite the exercise of practically absolute power with respect for Constitutional forms—to play the despot by the co-operation of his Parliament,—is afforded by the Act giving the King's Proclamations the force of law. The King having issued certain Royal Proclamations, the Judges held that those who disobeyed them could not be punished by the Council. The King then appealed to Parliament to give to his Proclamations the force of statutes. This request was complied with, but not without 'many large words.' The Act recites the contempt and disobedience of the King's Proclamations by some 'who did not consider what a King by his royal power might do,' and then, in order 'that the King might not be driven to extend his royal supremacy' enacts that Proclamations made by him, with the advice of a majority of his Council, should, under the penalty of fine and imprisonment, have

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introduced in either the Lords or Commons, and after passing through both Houses receives the Royal assent. No evidence is necessarily adduced to support it. It is analogous to a bill of pains and penalties, and was originally intended for the punishment of those who fled from justice. The earliest notable instance of its employment was in the banishment by Parliament of the two Despencers, father and son, in the 15th Edward II. A.D. 1321. —(Proceedings against the Despencers, 1 St. Tr. 23, 38.) See *supra*, p. 335, n. 3.

[1] Coke, Inst. iv. 37.

the force of statutes, but so that they should not be prejudicial to any person's inheritance, offices, liberties, goods and chattels, or infringe the established laws. It was moreover specially declared that such Proclamations should derive all their force 'from the authority of this Act,' and that no persons should 'by virtue of this Act suffer any pains of death;' but from this provision against capital punishment there was a formidable exception of such persons as 'should offend against any proclamation to be made by the King's highness, his heirs or successors, for or concerning any kind of heresies against Christian doctrine.'[1] The fact that the King was obliged to obtain this statute, and the considerable limitations with which it was granted, afford 'a striking testimony to the free constitution it infringed, and demonstrate that the prerogative could not soar to the heights it aimed at, till thus impelled by the perfidious hand of Parliament.'[2]

a striking testimony to the free constitution it infringed.

We have seen how the despotism of Henry was rendered possible by the decay and intimidation of the nobility and by the obsequiousness of the Commons. His arbitrary rule was still further augmented by the assumption of the Ecclesiastical supremacy, and the practical transfer to the Crown of the immense power which the Church had hitherto wielded. The dissolution of the monasteries not only supplied Henry with vast wealth with which to bribe the Temporal Peerage into implicit conformity with his will, but at the same time by depriving twenty-six Parliamentary abbots and two Parliamentary priors of their seats in the House of Lords, reduced, from a majority to a minority, the Spiritual Peerage, who alone were likely to be sufficiently independent to offer a serious

Power of the Crown increased by the assumption of the Ecclesiastical supremacy;

by the dissolution of the monasteries;

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[1] 31 Hen. VIII. c. 8.

[2] Hallam, Const. Hist. i. 35. By the Act 31 Hen. VIII. c. 8, transgressors against the King's Proclamations were to be tried and punished by certain persons enumerated therein, consisting of the usual officers of the Privy Council, together with some Bishops and Judges, 'in the star-chamber and elsewhere.' The prescribed number proving inconveniently large, another Act was passed in 1544 (34 Hen. VIII. c. 23) by which the jurisdiction was given to a tribunal of nine Privy Councillors.

and by the religious disputes.

opposition.[1] The Religious disputes of the Reformation also contributed in no small degree to sustain the influence of the Crown. The two great parties into which the nation was divided were too jealous of each other, too intent upon winning the favour of the King in order to crush their adversaries, to offer any real resistance to the encroachments of Royal power.

Popularity of Henry VIII.

Notwithstanding his many vices, Henry VIII. was on the whole popular with the mass of his subjects. The times were peculiarly favourable for the exercise of a strong paternal government. Henry secured to the people that domestic peace for which they so ardently longed; and recognising the spirit of the age as antagonistic to the tyranny of the Church, wisely headed the movement, and adroitly made use of it to secure his own personal ends, and to establish the tyranny of the Crown. His wars were uniformly successful, and if the maintenance of the balance of power between the Emperor Charles V. and Francis I. of France was productive of no material advantage, it flattered the pride of the English people, and exalted them in the estimation of the European nations. During the earlier portion of his reign at least, he displayed a frank, affable, and generous temper; he was no mean scholar; expert in all manly exercises; of noble presence and elegant bearing; and he at all times devoted a large portion of time to the arduous duties of personal government. Amidst the perils and dangers, foreign and domestic, to which the nation was on several occasions exposed during Henry's reign, men felt that in him they possessed an able, vigorous, and thoroughly national administrator.[2]

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[1] In the Parliament which met, after the dissolution of the monasteries, in 1539, there were present 41 Temporal Peers and only 20 Spiritual Peers.—Henry, Hist. Eng. xii. 151. To the 21 old bishoprics Henry VIII. subsequently added 6 new ones,—Westminster, suppressed in 1550, and Bristol, Chester, Gloucester, Oxford, and Peterborough, which still exist. [It is proposed now to revert to Henry's arrangement, and revive the separate existence of the see of Bristol.—ED.]

[2] For all that can possibly be said in Henry VIII.'s favour see Froude, Hist. Eng., vols. i.–iv. It is unnecessary, in order to recognise the abilities and greatness of Henry, that we should, with Mr. Froude, regard him as a virtuous and beneficent ruler, which he certainly was not.

Consolidation of the Kingdom.

Wales:

The consolidation of the kingdom with respect to both Wales and Ireland, was considerably advanced under Henry VIII. By the *Statutum Walliae* (12 Edward I. A.D. 1284) the land of Wales and its inhabitants, theretofore only feudally subject to the kings of England, had been wholly annexed and united to the English crown. But, although many material alterations were at the same time made in the Welsh laws, the conquered people still retained several provincial immunities and disabilities. They preserved their ancient rule of inheritance, similar to the English Gavelkind, by which lands were divided equally among all the issue male, instead of descending to the eldest son alone; but on the other hand, with the exception of two Parliaments of Edward II. in 1322 and 1326, to which 24 members were summoned as representatives of South, and other 24 as representatives of North Wales,[1] the Welsh people had continued without any representation in the House of Commons. By the statute 27 Henry VIII., c. 26 (1536), Wales was thoroughly incorporated into and united with England; all persons born in the Principality were admitted to enjoy and inherit all the freedoms, liberties, rights, privileges and laws of England; and lands in Wales were declared to be inheritable after the English tenures and rules of descent. By a subsequent statute (34 & 35 Henry VIII., c. 26), Wales was divided into 12 counties,[2] each empowered to send one knight to Parliament; and every borough, being a shire town, was to send one burgess. In the same year (1543), the County Palatine of Chester was admitted to Parlia-

[not represented in Parliament till 1543:]

[divided into counties, 1543.]

[Cheshire and Chester enfranchised, 1543.]

[1] Rymer, ii. 484, 649; Lingard, iii. 328.

[2] This was exclusive of Monmouthshire, which, though formerly part of Wales, had been made, by the 27 Hen. VIII. c. 26, before mentioned, one of the counties of the realm of England, and as such entitled to return two knights of the shire to Parliament. Under the statute 34 & 35 Hen. VIII. c. 26 (1542-3), superior courts of justice called Courts of Great Session were established, with a jurisdiction independent of the process of Westminster Hall. These continued to administer law and equity in Civil cases, and also Criminal matters arising within the Principality, down to the year 1830, when the courts were abolished by statute (1 Will. IV. c. 70), and it was enacted that Assizes should be held in the Principality for the trial of all matters Criminal and Civil in like manner and form as had been usual for the counties in England.

mentary representation, two knights for the county, and two burgesses for the city of Chester.[1]

Ireland.

During the Wars of the Roses, the authority of the English crown over Ireland had sunk to a very low ebb. At the accession of Henry VIII. his rule was practically limited, with the exception of the principal seaports, to the English Pale, consisting of the eastern half of the five counties of Louth, Meath, Dublin, Kildare, and Wexford. The western half of these counties was a march land, more disorderly, if possible, than the rest of the island, which was divided among a large number of petty chieftains, mainly of Irish but partly of English origin, who governed the inhabitants of their respective territories and made war upon each other with the freedom of independent princes. Under the strong government of the Tudor kings the English ascendancy in Ireland was re-asserted and placed upon a firmer basis than it had occupied since the days of Henry II. In the contest between the rival houses of York and Lancaster, the Anglo-Irish had for the most part espoused the cause of the White Rose, and they readily gave their support to the two pretenders who successively put in jeopardy the throne of Henry VII.[2] It was with the view of reducing to subjection the settlers within the Pale, that in 1495 was passed the celebrated Poynings's Law, as the statute of Drogheda was styled from Sir Edward Poynings, the deputy of young Henry, Duke of York (afterwards Henry VIII.), who at the age of four years had been appointed Lord Lieutenant of Ireland. This statute contained a variety of provisions for restraining the power of the great lords within the Pale, and strengthening the Royal authority. Its two most important enactments were: (1) All statutes 'lately made

Poynings's Law, 1495.

[1] 34 & 35 Hen. VIII. c. 13.

[2] Lambert Simnel was undoubtedly an impostor. It is a question of much uncertainty who the young man really was who called himself Richard, Duke of York, son of Edward IV., and who is generally styled by historians Perkin Warbeck. The evidence is not conclusive either way, but the balance seems to incline in favour of his pretensions. [Mr. Bailey, on the other hand (*Succession to the Crown*, p. 96), does not profess to doubt but that Perkin 'was an impostor.' Yet his marriage seems a point in his favour.—ED.]

in England, and belonging to the public weal of the same,' should have the force of law in Ireland. (2) No Parliament should in future be holden in Ireland till the King and his Council had been informed by the Lieutenant of the necessity of the same, and of the Acts proposed to be passed in it, and the Royal licence and approbation had been previously obtained. By securing the initiative power to the King and his English Council, a check was placed upon the action of every Irish Parliament, and upon the lord-deputies, sometimes powerful Irish nobles 'whom it was dangerous not to employ, but still more dangerous to trust.' 'Whatever might be its motive,' says Hallam, 'it proved, in the course of time, the great means of preserving the subordination of an island, which, from the similarity of constitution, and the high spirit of its inhabitants, was constantly panting for an independence which her more powerful neighbour neither desired nor dared to concede.'[1]

The stern and systematic despotism of Henry VIII., coupled with the intimidation produced by his relentless vengeance against the powerful family of Fitzgerald, had still greater effect in reviving the Royal authority. From a Lordship,—the title which it had hitherto borne under the successors of Henry II.,—Ireland was [restored] to the higher rank of a Kingdom;[2] the native chiefs came in and submitted; peerages were sought and obtained, not only by the Anglo-Irish, but by some of the most powerful of the old Irish families;[3] and although still far from secure, the English government in Ireland assumed during the last years of Henry VIII. a much more settled aspect than it had borne for very many years previously.

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[1] Const. Hist. iii. 362.

[2] Henry assumed the style of King of Ireland, January 23, 1542, under an Irish Statute, 33 Hen. VIII. c. 1. The change was confirmed in 1544 by an English Act of Parliament, 35 Hen. VIII. c. 3.

[3] William Bermingham was created Lord Carbery in 1541; Con O'Neill and his son Matthew, respectively Earl of Tyrone and Lord Dungannon, in 1542; Morogh O'Brien was made Earl of Thomond, Ulick de Burgh, Earl of Clanricarde, and Donough O'Brien, Lord Ibracken, in 1543.

EDWARD VI., 1547–1553. *MARY*, 1553–1558. Character of their Civil government.

The Ecclesiastical changes under EDWARD VI. and MARY, as well as those effected by Henry VIII., will be treated of in the succeeding chapter on the 'Reformation in England.' In their Civil aspect the reigns of Edward VI. and Mary were scarcely, if at all, less despotic than that of their father, although we shall see some signs that the House of Commons was beginning to recover a little of its ancient independence. The youth of Edward VI. precluded him from exercising any but a very slight influence upon affairs, the Royal power being practically vested first in the Protector Somerset and afterwards in John Dudley, Duke of Northumberland.

New treasons abolished.

One of the first acts of the young King's advisers was to endeavour to propitiate the nation by abrogating some of the sanguinary and unconstitutional laws of Henry VIII. By a statute of Edward's first Parliament all new treasons and felonies created during the last reign were abolished; and the Act of Edward III. again became the standard of high treason, except that to affirm in words or writing that the King was not, or that the Pope was, head of the Church, still remained a treasonable offence.[1]

But are re-enacted in 1552.

Two witnesses required in cases of treason.

In 1552, however, after the fall of Somerset, many of the treasons created under Henry VIII., and abolished by this statute, were re-enacted, together with some new ones.[2] But in this Parliament the Commons exhibited an unwonted independence, and zeal for liberty and justice. They threw out the bill as originally framed by the Ministers, and substituted one of a much more moderate nature, in which was embodied what has been justly described as 'one of the most important constitutional provisions which the annals of the Tudor family afford.'[3] The constant complaint of persons accused of treason, that they could not establish their innocence because never confronted with their accusers, had brought home to the public mind the

[1] 1 Edw. VI. c. 12.
[2] 5 & 6 Edw. VI. c. 11.
[3] Hallam, Const. Hist. i. 40.

iniquity of the usual method of procedure. It was now enacted that no person should in future be indicted or attainted for any manner of treason except on the testimony of *two lawful witnesses,* who should be brought face to face with the accused at the time of his trial, unless he should willingly confess the charges. Although shamelessly evaded, or utterly disregarded, in the State-trials under Elizabeth and James I., this salutary statute was ultimately recognised, when all ranks and parties had learnt moderation in the school of adversity, as the foundation of a rule of procedure which has afforded to the subject 'a mighty safeguard against oppressive prosecutions.'[1]

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[1] Foster, Crown Law, 238.

LAW OF TREASON.—The Law of Treason, with all its subtle distinctions and cruel constructions, is so interwoven with the thread of English Constitutional History, that some notice of it is absolutely necessary. In the following brief sketch every important feature has been touched upon. The crime of High Treason as it existed at Common Law prior to the statute of Edward III. was vague and indefinite. The fundamental principle upon which the law of treason was based, was the allegiance, either natural or local, due from every man who lives under the King's protection. Every subject from the age of fourteen, was bound to take the oath of allegiance if called upon to do so (Britton, lib. i. c. 13); but allegiance was equally due whether the oath had been taken or not. The smallest breach of allegiance was punished as treason; but the ruling of the Judges as to what constituted a breach was at once arbitrary and unlimited, varying in different reigns according as the power of the King or of the barons happened to be in the ascendant. In the reign of Edward I., appealing to the French courts, in opposition to the King's, was adjudged high treason in the case of Nicholas Segrave. Under Edward II., the Spencers were accused of 'accroaching' or exercising 'royal power,' by keeping the administration in their own hands, though without violence to the sovereign. A similar charge was brought against Roger Mortimer in Edward III.'s reign. Killing the King's uncle, father, brother, or even a messenger, was held to be treason, and a knight was indicted for the treason of 'accroaching royal power' by assaulting one of the King's subjects on the highway, and forcibly detaining him till he paid £90. At length, after frequent complaints and petitions from the Commons against the arbitrary decisions of the courts, the popular statute of 25 Edward III. st. 5, c. 2, was passed, strictly defining the limits of treason (*supra*, p. 288, *n.* 2). Seven heads of treason were declared by this statute, which also provided that no other cases should be adjudged by the Judges to be treason until the King and his Parliament should declare whether they ought to be so judged. The treasons enumerated in the statute of Edward are: (1) 'When a man doth compass or imagine the death of our lord the King, or of our lady the Queen, or of their eldest son and heir; or (2) if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or (3) if a man do levy war against our lord the King in his realm, or (4) be adherent to the King's enemies [=*alien enemies*, subjects of a hostile foreign power] in the realm, giving them aid and comfort in the realm or elsewhere, [*and* in any

Treason by the Common Law.

Treason by stat. 25 Edw. III. 1352.

Repeal of the Act giving the

The same Act of Edward's first Parliament which repealed the new-made treasons of Henry VIII., repealed

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such case] *thereof be proveably attainted of open deed by people of their condition* [*par gents de lour condition*—the *judicium parium* of Magna Charta]. (5) And if a man counterfeit the King's great or privy seal, or his money; (6) and if a man bring false money into this realm, counterfeit to the money of England, knowing the money to be false, to merchandize or make payment, in deceit of the King and his people; (7) and if a man slay the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices.'

The offence of counterfeiting the King's seals or his coins ought always to have been regarded as a branch of the *crimen falsi*, or forgery, rather than a species of the *crimen laesae majestatis*, or treason; and by the recent statutes, 24 & 25 Vict. cc. 98, 99, it is now punishable as felony only. Of the other species of treason enumerated it is unnecessary here to notice more than two, the 1st and 3rd.

(i.) *Compassing the King's death.*

(1) *Compassing or imagining the death of the King.* A king, within the meaning of the Act, must be in actual possession of the crown. Only a king *de facto* is the object of treason; a king *de jure*, who merely has a title or claim to the crown without possession, has no right to allegiance. Accordingly the Act 2 Hen. VII. c. 1, which is declaratory of the Common Law, declares that no person shall be convicted or attainted of treason for serving and paying allegiance to a king *de facto*. The words *compass* and *imagine* are synonymous, and denote the purpose or design of the mind or will, even though the purpose or design take not effect; but the statute especially requires that the traitorous imagination be manifested by some *overt* or open act. Still, it is the mental act, which, under this head of the statute, constitutes the crime of treason; and therefore in the trial of the Regicides, in 1660, it was held that not the decapitation of Charles I. but the 'compassing' his death constituted the treason, and that the killing was only an overt act proving the compassing. Meeting and consulting *how* to kill the King, although no scheme be finally adopted, is an overt act; and every person who assents to overtures for that purpose, or who encourages others, by advice, persuasion, or command, to commit the fact, shares in the guilt. Sir Everard Digby was convicted, in January 1606, of high treason for being privy to and not revealing the Gunpowder Plot, although it was not proved that he either said or did anything at the consultation. Not merely personal plots of assassination, but all wilful and deliberate attempts which may immediately, or consequentially, endanger the life of the Sovereign, have been held within the scope of the statute. Thus a conspiracy to depose or imprison the King has been constructively determined to be an overt act of compassing his death; 'for experience has shewn,' observes Sir Michael Foster, (p. 196), 'that between the prisons and the graves of princes the distance is very small.' Other offences still less personal, but having a remote tendency towards the same end, have been held to be overt acts under this head of treason. Entering into measures in concert with foreign powers to invade the kingdom, would seem more properly to fall under the head of levying war or of adhering to the King's enemies. But unless the powers incited be actually at war it will not fall within any branch of the statute, except compassing the King's death. And even when the overt act would have properly fallen within the clause of adhering, it has been held an overt act of compassing, as in the case of Patrick Harding, who raised and sent men to France, then at open war with us, for the purpose of restoring James II.

Overt acts of compassing.

Corresponding with foreigners to invade the kingdom.

Strained constructions of the statute.

The Duke of Norfolk was convicted in 1572, contrary to all law and justice, of a treason resting on presumptions and inferences only. The overt act was his intended marriage with Mary Queen of Scots, and his correspondence with the Duke of Alva to raise an army to invade the kingdom. It was argued that as

also the statute which had given to that monarch's Proclamations the force of law. But this made little practical

King's Proclamations the force of law.

Mary had formerly laid claim to the crown, whoever married her would support her title, and consequently endeavour to depose Queen Elizabeth. The letters to Alva had no signatures, and were only proved to be the Duke's by reading the confession of an agent, who vouched for their authenticity. A distinct act of treason, such as levying war, has been decided to be an overt act of compassing. The statute 29 Hen. VI. c. 1, which attainted Jack Cade of rebellion, declared that gathering men together and exciting them to rise against the King was an overt act of imagining his death. Mere loose words spoken, not relating to any treasonable purpose in agitation, are not an overt act; but words may *expound* an overt act, in itself *indifferent*, and words of advice and persuasion in contemplation or prosecution of a traitorous design, actually on foot, may be overt acts. Words *written and published*, either in letters or books, where the matter contained *imports a compassing*, have been held overt acts. It was so held in *Twyn's* case (15 Car. II.), for publishing "A Treatise of the Execution of Justice," asserting that the supreme magistrate was accountable to the people, and that they might take up arms to put the King to death: and in *Williams's* case (17 Jac. I.), for enclosing and sending in a box to James I. a book declaring that the King would die in the year 1621, and that the kingdom would be destroyed. Under the Stuarts, even *unpublished* writings were made use of to convict their authors of treason, as in *Peacham's* case (1615), in whose study was found a manuscript sermon which had never been preached or published; and in that of *Algernon Sidney*, at whose trial (in 1683) for participating in the Rye House Plot, the want of a second witness was supplied by the production of a discourse found in his closet, and evidently written many years before, in which it was maintained that kings were accountable to the people for their conduct.

Levying war.

Words, written and published:

[*Twyn's case.*]

[*Williams's case.*]

unpublished.

[*Peacham's case.*]

(2) The third species of treason enumerated in the Statute of Edward III. is that of *levying war*, which lies not in the intention or purpose, but in the act itself. The levying must be *against the King*, which is either direct, against his person, or constructive, against his government. Enlisting and marching have been held sufficient acts without coming to a battle or action. Attacking the King's forces in opposition to his authority, upon a march or in quarters, and holding a castle or fort against the King or his forces, if actual force be used in order to keep possession, have been held a sufficient levying of war. The true criterion as to what unlawful assemblies amount to a levying of war, is *Quo animo* did the parties assemble? and in order to constitute the offence, the object of the assembly must be to effect by force something of a *public and general concern*. For if the assembly be upon account of some *private* quarrel, or to take revenge on *particular* persons, the statute of Edward itself has specially declared that it is no treason. 'If any man,' says the statute, 'ride armed, open or secretly, with men of arms, against any other to slay or to rob him, or to take and keep him till he make fine for his deliverance, it is not the mind of the King or his council that in such case it shall be judged treason; but it shall be judged felony or trespass according to the law of the land *of old time used*, and according as the case requireth.' In accordance with this principle, and within the reason and equity of the statute, while on the one hand, popular risings to maintain a *private* claim or to destroy *particular* enclosures, or to break prisons in order to release *particular* persons, and risings of men of a *particular* class against others of the same class,—as of the weavers in and about London, who rose to destroy all engine-looms because those machines enabled those of the trade who made use of them to undersell those who had them not—have been held *not* to amount to levying war within the statute: on the other hand, with equal reason, every insurrection which in judgment of law is intended against the person of the King, either to dethrone or imprison him, or to oblige him to alter his measures of government, or to remove evil

(ii.) *Levying war against the King.*

Acts of levying.

But illegal Proclamations still

change with regard to Royal Proclamations. Several were issued during Edward's reign, enforced by penalty of fine

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counsellors,—although not conducted with military array—has been held to be a levying of war within the statute. Another class of popular risings, not levelled at the person of the King, but "against his Royal Majesty," that is, against the established law and government, have been brought within the clause of the statute against 'levying war against the King,' by constructions scarcely less strained than those upon compassing his death. Acting upon the logical distinction between general and particular purposes, but regardless of the fact that in the majority of cases there was an entire absence of any intention either to depose the Sovereign or to generally subvert his government, the courts held trifling insurrections for the purpose of destroying *all* brothels, or of throwing down *all* enclosures or *all* dissenting meeting houses (case of *Damaree and Purchase*, arising out of Sacheverell's trial, St. Tr. viii. 218, 267), or to enhance the price of *all* labour, or to open *all* prisons, or to expel *all* foreigners, or to redress real or imaginary *national* grievances in which the insurgents had no special interest,—to be constructive 'levyings' within the statute.

Conspiracies to levy war.

It is to be noted that the Statute of Edward III. entirely omitted in its enumeration of the modes whereby treason could be committed, to include the act of conspiring or consulting to levy war. But by a strained construction it gradually became the established doctrine that a conspiracy to levy war against the King's person, though not in itself a distinct treason, might be received in evidence as an overt act of compassing his death. Notwithstanding this construction, however, it was thought necessary under Elizabeth, Charles II., and George III., to pass temporary acts rendering a conspiracy to levy war treasonable (13 Eliz. c. 1; 13 Car. II. c. 1; 36 Geo. III. c. 7). The disposition to extend a constructive interpretation to the Statute of Edward III. continued to increase down to the end of Geo. III.'s reign, during which it was carried to a great length, especially by Chief Justice Eyre in the trials of 1794. Finally by the 57 Geo. III. c. 6, making perpetual the temporary Act, 36 Geo. III. c. 7 (the main object of which seems to have been to turn into substantive treasons certain things which had been judicially construed to be treasonable) it is enacted: (1) that if any person shall, within the realm or without, compass, imagine, invent, devise or intend death, destruction, or any bodily harm tending to death or destruction, maiming or wounding, imprisonment or restraint of the person of the King, his heirs and successors; and shall express, utter, or declare such intention by publishing any printing or writing, or by any overt act or deed; being legally convicted thereof upon the oaths of two lawful and credible witnesses,—he shall be adjudged a traitor and suffer as in cases of high treason. (2) It was also declared by the same Act that it should be treason to compass, imagine or intend (such intention being expressed by print, writing or overt act) to deprive or depose the King or his successors from the style, honour, or kingly name of the imperial crown, or to levy war within the realm, in order by force to compel the sovereign to change his measures or counsels, or to overcome either House of Parliament, or to stir any foreigner with force to invade this realm, or any of the King's dominions. Neither under this Act, nor, as we have seen, under any of the judicial constructions, was the *speaking* of words, not written or published, held to amount to an overt act of treason, unless the words were direct counsellings or persuasions in prosecution of a traitorous design actually on foot. Thus the law continued down to the year 1848, when the 11 & 12 Vict. c. 12, 'An Act for the better security of the Crown and Government of the United Kingdom,' was passed. By this Act, commonly called the 'Treason-Felony Act,' the latter part of the statute 57 Geo. III., not relating to the King's person was repealed, and the offences therein enumerated were made felonies, but with the

36 Geo. III. c. 7, and 57 Geo. III. c. 6.

Treason-Felony Act, 11 & 12 Vict. c. 12.

and imprisonment; and by one issued in 1549, all Justices of the Peace were commanded to arrest 'sowers and tellers

continued to be issued.

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addition of the words 'open and advised speaking' to the other modes of expressing the compassing.

Treasons created by 1 Anne, st. 2, c. 17; 6 Anne, c. 7;

In addition to the species of treason already enumerated, the three following have been created by statutes still in force. (1) By 1 Anne, st. 2. c. 17, s. 3, the endeavouring to deprive or hinder any person being the next in succession, according to the limitations of the Act of Settlement, from succeeding to the Crown, and maliciously and directly attempting the same by any overt act. (2) By 6 Anne, c. 7, the maliciously, advisedly and directly, by writing or printing, maintaining and affirming that any other person hath any right or title to the crown of this realm, otherwise than according to the Act of Settlement, or that the kings of this realm, with the authority of Parliament, are not able to make laws and statutes, to bind the Crown and the descent thereof (*supra*, p. 234). (3) By 3 & 4 Vict. c. 52, s. 4 (having reference to the contingency that any issue of the Queen should happen to ascend the throne under the age of 18), it was enacted that any person aiding or abetting in bringing about a marriage to, as well as any person so marrying, such issue under the age of 18, without the consent in writing of the Regent, and the assent of both Houses of Parliament previously obtained, should be guilty of treason.

3 & 4 Vict c. 52.

Evidence.

Statute of Edw. VI.

At common law, one positive witness was sufficient in the case of treason as in every other capital case. But by the salutary Act, 5 & 6 Edw. VI. c. 11, to which reference has been made in the text, it was enacted 'that no person shall be indicted, arraigned, condemned, convicted, or attainted, for any treasons that now be, or hereafter shall be, which shall hereafter be perpetrated, committed or done, unless the same offender or offenders be thereof accused *by two lawful accusers; which said accusers*, at the time of the arraignment of the party accused, *if they be then living, shall be brought in person before the party so accused, and avow and maintain that that they have to say against the said party, to prove him guilty of the treason* or offences contained in the bill of indictment laid against the party arraigned.' Yet for a century after the passing of this Act, little if any regard was paid to it in crown prosecutions, or indeed to the common well-known rules of legal evidence. It was even contended that a statute of 1 & 2 Phil. & Mary, c. 10 (which, as Sir Michael Foster has shown, was really meant to restore to the accused 'the benefit of a trial by jury of the proper county, with all the advantages of defence peculiar to that method of trial, where former statutes had deprived him of it'), had repealed the statute of Edward VI. by enacting that 'all trials for any treason shall be according to the due *order and course of the common law* and not otherwise.' At the trial of the Regicides, however, in 1660, and upon Lord Stafford's trial, in 1680, it was treated as a point beyond all doubt that the law required two witnesses; and from the date of the Restoration the wholesome distinction (subsequently established by the Statute of William III.) appears to have been taken, that although the two witnesses may depose to different overt acts, the acts must relate to *the same species of treason;* so that one witness to an alleged act of compassing the King's death cannot be conjoined with another deposing to an act of levying war, in order to make up the required number. In 1691, a Bill for the regulation of trials upon charges of high treason passed the Commons; but in consequence of the opposition of the Court, and a dispute between the two Houses, it fell to the ground. Though more than once revived, the obstinacy of the Commons in resisting a very just and reasonable amendment of the Lords as to the trial of Peers in the court of the High Steward, delayed the passing of the measure until 1695, when it became law as the Act 7 Will. III. c. 3. It provides that prisoners indicted for high treason shall have a copy of the indictment delivered to them five

Statute of William III. 1695.

abroad of forged tales and lies,' and to commit them to the galleys, there to row in chains as slaves during the King's pleasure.[1] The same practice was continued under Mary, who in the last year of her reign went so far as to issue a Proclamation which, after denouncing the importation of books filled with heresy and treason from beyond sea, declared that whosoever should be found to have such

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days at least before the trial, and a copy of the panel of the jurors two days before the trial; that they shall be allowed the assistance of counsel throughout the trial, and be entitled to process of the court to compel the attendance of their witnesses, who must be examined on oath. It removes any doubts as to the statute of Edw. VI. by requiring the oaths of two lawful witnesses, either both to the same overt act, or one of them to one, and the other to another overt act of the same treason; unless the prisoner shall willingly, without violence, in open court, confess the charge. It limits prosecutions for treason to the term of three years from the commission of the offence, except in the case of attempted assassination of the King. The contested provision as to the trial of Peers (intended to remedy a serious defect in the constitution of the court of the High Steward, in which the Peers-triers were a select number returned at the nomination of the High Steward) was included in the Act, which provided that all Peers having a right to sit and vote in Parliament shall be summoned on the trial of any Peer for treason, and that every Peer so summoned and appearing shall vote in the trial. By a later statute, 7 Anne, c. 21, the time for delivering a copy of the indictment to the prisoner was extended to ten days, and it was directed that a list of the witnesses intended to be brought for proving the indictment, and of the jury, with their professions and places of abode, should be delivered to the prisoner at the same time with the copy of the indictment. But the operation of this clause was suspended until after the death of the Pretender.

Statute of [7] *Anne,* 1708.

In recent times the tendency of the legislature has been to restrict rather than to enlarge the crime of treason. Since the passing of the 'Riot Act,' 1 Geo. I. st. 2, c. 5, the Government has possessed a great accession of strength in dealing with all tumultuous risings attended with violence, and can more advantageously treat the offence as felony under that Act than as treason. A large number of offences formerly punishable as treason have been removed into the class of 'treason-felony' by the Act 11 & 12 Vict. c. 12, to which reference has already been made. By another Act of the present reign, 5 & 6 Vict. c. 51, the offence of any person discharging, pointing, aiming, or presenting, at the person of the Queen, any gun or other arms (whether containing explosive materials or not); or striking at or attempting to throw anything upon her person; or producing any firearms or other arms, or any explosive or dangerous matter near her Majesty's person;—*with intent to injure or alarm her*, is declared to be a high misdemeanour and punishable by penal servitude for seven, or not less than three, years; or by imprisonment for not more than three years, and (if the court shall so direct) by a whipping not more than thrice during that period. A conviction under this statute may be supported by the like evidence as if the prisoner stood charged with murder, so that the rule requiring two witnesses is in this case dispensed with. By the 33 & 34 Vict. c. 23, forfeiture and attainder for treason or felony have been abolished. On the subject of this note see Sir Michael Foster, Crown Law; Hale, Pleas of the Crown; Kelyng, Crown Cases (3rd ed.); Hawkins, Pleas of the Crown.

The Riot Act, 1 *Geo. I.*

5 & 6 *Vict. c.* 51.

[1] Strype, ii. 149; Hallam, Const. Hist. i. 38.

books in his possession should be reputed and taken for a rebel, and executed according to martial law.[1]

Insurrections in 1549.

The year 1549 was remarkable for the tumults and insurrections of the common people which arose in many counties. In Cornwall and Devonshire under Humphrey Arundel, and in Norfolk under Ket, the risings assumed formidable dimensions, and were suppressed with some difficulty. They arose partly from opposition to the Reformed doctrines, but mainly from discontent at the proceedings of the landowners, who, regardless of the ancient commonable rights of their tenants, made large enclosures of the waste or common lands of manors; and, experience having shown that the growth of wool was more profitable than that of corn, converted the arable land into pasture. This strictly commercial mode of dealing with their estates was especially adopted by the newly-made nobles and gentry who had acquired a large share of the confiscated abbey lands, and both they and the Reformed religion which they professed became objects of hatred to the thousands of agricultural labourers whom the restriction of tillage had thrown out of employment, and the cultivation of commons had deprived of one great source of support.[2] For

Their origin.

Enclosures of commons.

Arable turned into pasture.

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[1] Strype, iii. 459; Hallam, Const. Hist. i. 43. There was some excuse for this arbitrary proceeding in the fact that a violent libel had recently been written at Geneva by Goodman, a refugee, exciting the people to dethrone the Queen; and that, in 1557, Sir Thomas Stafford, a grandson of the Duke of Buckingham beheaded by Henry VIII., had sailed from Dieppe with the connivance of the French king, and landing at Scarborough with a small force had vainly endeavoured to raise the people in rebellion against 'the most devilish devices of Mary, unrightful and unworthy queen.' (Strype, iii. 259–262.)

[2] 'Parallel to the religious Reformation, social changes of vast importance were silently keeping pace with it. In the break-up of feudal ideas the relations of landowners to their property and their tenants were passing through a revolution; and between the gentlemen and the small farmers and yeomen and labourers were large differences of opinion as to their respective rights. The high price of wool and the comparative cheapness of sheep farming continued to tempt the landlords to throw their ploughlands into grass, to amalgamate farms, and turn the people who were thrown out of employment adrift to shift for themselves. The commons at the same time were being largely enclosed, forests turned into parks, and public pastures hedged round and appropriated. Under the late reign these tendencies had with great difficulty been held partially in check; but on the death of Henry they acquired new force and activity. The enclosing, especially, was carried forward with a disregard of all rights and interests, except those of the proprietors.' Froude, Hist. Eng.

Act against unlawful and rebellious assemblies.

the suppression of these risings in future, a very severe Act was passed by Parliament against unlawful and rebellious assemblies, by which it was declared to be treason for any twelve persons to meet together on any matter of state, and felony if the object of the assembly was to destroy enclosures.[1]

Violence of Mary's reign.

Independently of the sanguinary Religious persecutions of Mary's reign, her Civil government was characterised by much violence and arbitrariness. Reference has already been made to her Proclamation ordering the possessors of heretical and seditious books to be executed by martia law. Her zeal for the restoration of the Roman Catholic religion caused her to anticipate the authority of Parliament in her dealings with the clergy and the services of the Church which she found legally established at her accession. She followed the example of her predecessors in extorting loans from her subjects.[2] She imposed a duty upon foreign cloth without the assent of Parliament; and illegal modes of punishment, the torture especially, are 'more frequently mentioned in her short reign than in all former ages of our history put together.'[3]

In 1557, a Commission was issued to Bishop Bonner and others authorising them to inquire rigorously concerning 'devilish and clamorous persons' who spread seditious reports or brought in heretical and seditious books, or neglected or contemned the ceremonies of the Church, and in some instances to fine, imprison, or 'otherwise

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v. 107. 'It is the common custom with covetous landlords to let their housing so decay, that the farmers shall be fain for small regard or coin to give up their leases, that they, taking the ground into their own hands, may turn all into pasture. So now old fathers, poor widows, and young children lie begging in the streets.' Sermon of Lever in Strype's *Memorials*.

[1] 3 & 4 Edw. VI. c. 15.

[2] In the directions to the Commissioners for a forced loan in 1557 they are informed that should any persons be 'froward' they were to be compelled to find sureties to appear before the Privy Council when called on, or else to be arrested on the spot and sent to London. £110,000 was collected under this commission in spite of outcry and resistance. Commission for the Loan, S.P., Mary, Domestic, vols. xi. xii., cited in Froude, Hist. Eng. v. 486.

[3] Hallam, Const. Hist. i. 42.

punish' the guilty; in others of a graver nature to remit them to the spiritual courts. It was feared at the time that this proceeding was a preliminary to the establishment of the Inquisition; it proved, in fact, to be the precursor of the High Commission Court of the next reign.[1]

The violence of Mary's reign is in curious contrast with the humane and enlightened sentiments enunciated in the preamble of the first Act upon her Statute-book.[2] Like her immediate predecessor, Mary began her reign by a statute repealing all new treasons and felonies, although, as in his case, new treasons were very soon again introduced. In the preamble of the abolishing statute it is recited 'that the state of a king standeth more assured by the love and favour of the subject towards the sovereign, than in the dread and fear of the laws made with rigorous pains and extreme punishment;' and that 'laws made without extreme punishment are more often obeyed than laws made with extreme punishment.'

Doubts as to the powers of a Queen regnant:

Mary was the first Queen regnant of England (for it is unnecessary to take into account the nine days' usurpation of the unfortunate Lady Jane Grey);[3] and some doubts were at one time started as to her Constitutional powers. Some of the Reformed preachers even went so far as to contend that the government of a woman was both prohibited by the word of God, and unrecognised by the laws of the land, which conferred no authority upon queens. On the other hand a silly book was written to exalt Mary's prerogative, on the pretence that as Queen she was not bound by the laws of former Kings. Mary showed her contempt for this sophism by herself throwing the book into the fire. But to set all questions at rest an Act was passed to declare that 'the royal power and dignities,

Settled by Act of Parliament.

[1] Burnet, ii. 256; iii. 243.

[2] 1 Mary, c. 1, an Act to 'Repeal and take away Treasons, Felonies, and cases of Praemunire.'

[3] After the capture of King Stephen at the battle of Lincoln, in February, 1141, the Empress Matilda was elected '*Domina* Angliae' on the 8th of April following; but although she held courts and issued charters in Royal form, she never succeeded in making good her claim to the crown.

vested in a queen the same as in a King,' and that all statutes in which a King was named applied equally to a Queen.[1]

Reviving independence of the Commons:

Under Henry VIII. there is only one instance, in 1532, when the Commons refused to pass a Bill recommended by the Crown. But under Edward VI. and Mary, they on several occasions rejected Bills sent down from the Upper House; and we have seen how they insisted upon the insertion in the Act of Edward VI. creating new treasons, of the provision requiring proof of the offence by the testimony of two witnesses in open court.

Met by the creation of rotten boroughs and by influencing the elections.

These indications of reviving independence on the part of some of the Commons were met by the creation of rotten boroughs and by the direct interference of the Crown in elections. Edward VI. created or restored twenty-two boroughs, of which at least half, including seven in Cornwall, were places of no kind of importance. Mary added fourteen to the number, and Elizabeth, in a similar manner, increased the representation in Parliament by no less than sixty-two Members. The interference of the Crown in elections was exerted in the most open manner. In 1553 Edward VI. directed a circular letter to all the sheriffs, commanding them to apprise the freeholders, citizens, and burgesses of their respective counties, 'that our pleasure and commandment is, that they shall choose and appoint, as nigh as they possibly may, men of knowledge and experience within their counties, cities, and boroughs;' and especially that whenever the Privy Council, or any of them, having instructions on the King's behalf, should 'recommend men of learning and wisdom, in such case their directions be regarded and followed.' Accordingly several persons—all of them belonging to the Court, or in places of trust about the King—were recommended by letters to the sheriffs, and elected as knights for different shires.[2] The writs for the Parlia-

[1] 1 Mary, sess. 3, c. 1.

[2] Hallam, Const. Hist. i. 45, citing Strype, ii. 394. What appear to be first drafts of circular letters are preserved in Lansd. MS. 3, cited by Froude, v.

ment summoned by Mary in 1554, to sanction the return of the country to obedience to the Apostolic See, were accompanied in like manner by Royal circulars requiring the mayors, sheriffs, and other influential persons to admonish the electors to choose as their representatives 'such as, being eligible by order of the laws, were of a wise, grave, and Catholic sort';[1] and the Earl of Sussex, one of the Queen's councillors, wrote to the electors of Norfolk and to the burgesses of Yarmouth requesting them to reserve their votes for the persons whom he should name.[2]

464, n. 1. In some instances the orders of the Crown were sent direct to the candidate himself. The Council, in a letter to Sir P. Hoby, inform him 'that his Majesty hath willed us to signify unto you this his pleasure to have you one of the Commons House, which thing we also require you to foresee, that either for the county where ye abide ye be chosen knight, or else otherwise to have some place in the House, like as all others of your degree be appointed. And herein, if either his Majesty or we knew where to recommend you, according to your own desires, we would not fail but provide the same.' Harl. MS. 523, in Froude, v. 465.

[1] Froude, vi. 260. These general directions were copied from a form which had been in use under Henry VII.

[2] Burnet, ii. 228.

[On the Tudor period, M. Glasson, *Hist. du Dr. et des Inst. Pol. de l'Angl.*, v. c. 1, notes both the historical development of the English Reformation from causes long in operation, and the extension of English influence in Continental politics. For Edw. VI. he refers to the *Relazione* of Daniel Barbaro, Ambassador from the Venetian Republic, 1548–50, printed in Alberi, *Rel.* viii. 238 *seqq*. On the Venetian *Relazioni*, and their importance, see in *North British Review*, June, 1866, an interesting article based on the collections of Alberi and Berchet, and the special works of Tommaseo and Baschet. The 'Tudor Monarchy' forms the subject of the opening chapter in vol. i. of the edition in 10 vols., cr. 8vo., Lond. 1883, of the valuable *History of England*, 1603–1642, by S. R. Gardiner, LL.D.—Ed.]

CHAPTER XI.

THE REFORMATION IN ENGLAND.

The Reformation under Henry VIII. Political and Legal rather than Religious.

Doctrinal changes under Edward VI. and Elizabeth, an unintentional consequence.

Both were the effect of causes long in operation.

THE separation of the Church of England from that of Rome, formally accomplished under Henry VIII., was a Political and Legal rather than a Religious reformation. The doctrinal changes which followed under Edward VI. and Elizabeth, were an unintentional consequence, to which Henry and his Parliament more than once declared themselves utterly repugnant. But in reality the Reformation, in both its Political and Religious aspects, was the effect of causes which had been in operation for centuries, not only in England, but throughout Europe. 'No revolution,' says Hallam, 'has ever been more gradually prepared than that which separated almost one half of Europe from the communion of the Roman see; nor were Luther and Zwingle any more than occasional instruments of that change which, had they never existed, would at no great distance of time have been effected under the names of some other reformers. At the beginning of the sixteenth century, the learned doubtfully and with caution, the ignorant with zeal and eagerness, were tending to depart from the faith and rites which authority prescribed.'[1]

Early and continuous National character of the English Church.

In England, the Church, from its first institution, had always possessed a marked National character. The spiritual primacy of the Pope and his authority in matters of Faith were reverently admitted, but the relation was rather that of mother and daughter than of master and

[1] Hallam, Const. Hist. i. 57.

servant;[1] while the exorbitant claims of jurisdiction and territorial power asserted by Hildebrand and his successors, together with the pecuniary exactions founded on those claims, were persistently, though with varying degrees of firmness, resisted by the English kings and people.

Practical identity of Church and State before the Norman Conquest.

Prior to the Norman Conquest, Church and State in England were so intimately united that they were practically identical. William of Normandy, to further his designs on England, entered into an alliance with the Papacy; and when the Conquest—which it had been his object to present to the eyes of Europe somewhat in the light of a Crusade—had been effected, the Ecclesiastical power was to a great extent separated from the Civil power and placed in much closer communion with and subordination to the Papal See. But anxious as he was to propitiate the See of Rome, William was careful not to surrender the ancient supremacy of the State over the National Church.[2] Still, the impetus given by the Conquest to the Papal power in England caused it to go on rising, until—notwithstanding the partial checks which it received under Henry I. and Henry II., on the questions of Investitures and clerical immunity from Civil jurisdiction—it reached its acme under John and Henry III. For one hundred and fifty years succeeding the Conquest the right of nominating the archbishops, bishops, and mitred abbots had been claimed and exercised by the King. This right had been specially confirmed by the Constitutions of Clarendon, which also provided that the revenues of vacant sees should belong to the Crown. But John admitted all the Papal claims, surrendering even his Kingdom to the Pope, and receiving it back as a fief of the Holy See. By

Growth of Papal power from the Conquest till the reign of Henry III.

[1] For the *maternal* status of the Church of Rome, see S. Bernard and Hildebrand. '. . . ante omnia S. R. Ecclesiam, . . . Ecclesiarum Matrem esse non Dominam, te verò non Dominum episcoporum sed unum ex ipsis.' S. Bern., De Consid. l. iv. c. vii. 'Dei Ecclesia, quae Mater et Domina nostra est.' Greg. VII. Lib. V. Ep. 20. [But John of Salisbury, no less than Frederick II., complains of the *mater* as becoming a *noverca*. *Polyc.* vi. 24. The Lollards called the Roman Church *noverca*, and the English Church *Ecclesia nostra*.—Ed.]

[2] *Supra*, p. 75.

the Great Charter the Church recovered its liberties; the right of free election being specially conceded to the cathedral chapters and the religious houses. Every election was, however, subject to the approval of the Pope, who also claimed a right of veto on institutions to the smaller church benefices,—the small monasteries and parish churches which were in the hands of private patrons, lay or ecclesiastical. 'There was thus in the Pope's hand,' remarks an eminent historian,[1] 'an authority of an indefinite kind, which it was presumed that his sacred office would forbid him to abuse, but which, however, if he so unfortunately pleased, he might abuse at his discretion. He had absolute power over every nomination to an English benefice; he might refuse his consent till such adequate reasons, material or spiritual, as he considered sufficient to induce him to acquiesce, had been submitted to his consideration. In the case of nominations to the religious houses, the superiors of the various orders residing abroad had equal facilities for obstructiveness.' Under Henry III. the power thus vested in the Pope and foreign superiors of the Monastic orders was greatly abused, and soon degenerated into a mere channel for draining money into the Roman exchequer.

Edward I. resists the Papal claims and exactions.

Answer of the English Parliament to the letter of Boniface VIII.

Edward I. firmly withstood the exactions of the Pope, and re-asserted the independence of both Church and Crown. To the letter of Boniface VIII. claiming to be feudal lord of Scotland, and commanding Edward I. to withdraw his troops from that kingdom and submit his pretensions to the decision of the Papal see, the Parliament of England returned a very emphatic repudiation of the Pope's Temporal jurisdiction. 'The Kings of England, they said, 'have never pleaded, or been bound to plead, respecting their rights in the kingdom of Scotland, or any other their temporal rights, before any judge, ecclesiastical or secular. It is, therefore, and by the grace of God shall always be, our common and unanimous resolve that with respect to the rights of his kingdom of Scotland, or other

[1] Froude, Hist. Eng., ii. 3.

his temporal rights, our aforesaid lord the King shall not plead before you, nor submit in any manner to your judgment, nor suffer his right to be brought in question by any inquiry, nor send agents or procurators for that purpose to your court. . . . Neither do we, nor will we, permit, as we neither can nor ought, our aforesaid lord the King to do, or attempt to do, even if he wished it, any of the things aforesaid.'[1]

Series of Statutes passed to check the aggressions of the Pope.

De Asportatis Religiosorum, 35 Edward I. 1306–7.

To prevent superiors resident abroad from levying taxes on English religious houses.

In the reign of the great Edward began a series of statutes passed to check the aggressions of the Pope, and restore the independence of the National church and kingdom. The first of the series was passed in 1306–7. It recites that 'the abbots, priors, and governors of religious houses, *and certain aliens their superiors*, as the abbots and priors of the Cistertians, the Premonstrants, the orders of Saint Augustine and of Saint Benedict, and many more of other religions and orders, have at their own pleasure set divers heavy, unwonted, and unportable talliages, payments and impositions upon every of the said monasteries and houses subject unto them in England, Ireland, Scotland and Wales, without the privity of the King and his nobility, contrary to the laws and customs of the said realm;' and that in consequence of such impositions, 'the service of God is diminished; alms are not given to the poor, the sick, and the feeble; the health of the living and the souls of the dead be miserably defrauded; hospitality, almsgiving and other godly deeds do cease; and so that which in times past was charitably given to godly uses and to the service of God, is now converted to an evil end, by permission whereof there groweth great scandal to the people.' It was therefore enacted,—'the King considering it would be very prejudicial to him and his people, if he should any longer suffer so great losses and injuries to be winked at,'—that for the future no abbot or other religious person should, directly or indirectly, secretly or openly, carry or send any tax, rent or talliage, imposed by the superiors, or

[1] Rymer, ii. 873–875.

assessed amongst themselves, out of the kingdom; and that 'priors aliens' should not presume to assess any such payment whatever upon religious houses subject to them.[1]

This statute was confirmed under Edward III. in the 4th, and again in the 5th year of his reign; and in the 25th of his reign, roused 'by the grievous complaints of all the commons of his realm,' the King and Parliament passed the famous Statute of Provisors, aimed directly at the Pope, and emphatically forbidding his nominations to English benefices. The preamble recites that 'the holy Church of England was founded in the estate of prelacy within the realm of England,' by the King's progenitors and the ancestors of 'the earls, barons, and other nobles of his realm,[2] to inform them and the people of the law of God, and to make hospitalities, alms, and other works of charity, in the places where the churches were founded, for the souls of the founders, their heirs, and all Christians; and certain possessions as well in fees, lands, rents, as in advowsons, which do extend to a great value, were assigned by the said founders to the prelates and other people of the Holy Church of the said realm to sustain the same charge . . . . the same kings, earls, barons, and other nobles, as lords and advowees, have had, and ought to have, the custody of such voidances, and the presentments of the collations of the benefices being of such prelacies: And the said Kings in times past were wont to have the greatest part of their council, for the safeguard of the realm when they had need, of such prelates and clerks so advanced; the Pope [Pape] of Rome accroching to him the seignories of such possessions and benefices, doth give and grant the same benefices to aliens, which did never dwell in England, and to cardinals which might not dwell here, and to others as well aliens as denizens, as if he had been patron or advowee of the said dignities and benefices, as he was not of right by the law

Statute of Provisors, 25 Edw. III., 1351.

[1] 35 Edw. I. st. i. c. 1–4.

[2] [This statement as to the foundation of the English Church is not historically accurate.—ED.

of England. . . . And . . . now of late, our holy father the Pope . . . taketh of all such benefices the first fruits and many other profits, and a great part of the treasure of the said realm is carried away and dispended out of the realm by the purchasers of such [benefices and] graces aforesaid: and also by such privy reservations, many clerks advanced in this realm by their true patrons, which have peaceably holden their advancements by long time, be suddenly put out.' It was therefore declared that the elections of bishops and other dignitaries should be free as in time past; that the rights of all patrons should be preserved; and penalties of imprisonment, forfeiture, or outlawry, according to the degree of the offence, were enacted against all 'provisors,' who should obtain benefices from Rome by purchase or otherwise.[1]

Statute forbidding citations to the Court of Rome, 27 Edw. III. st. 1. 1353.

Three years afterwards it was found necessary to pass a statute, forbidding citations to the Court of Rome. It was based upon 'the grievous and clamorous complaints of the great men and commons, how that divers of the people be and have been drawn out of the realm to answer of things whereof the cognisance pertaineth to the King's court; and also that the judgments given in the same court be impeached in the court of another in prejudice and disherison of our lord the King, and of his crown, and of all the people of his said realm, and to the undoing and destruction of the common law of the same realm at all times used.' The cumulative penalties of outlawry, forfeiture of lands and goods, and imprisonment at the King's pleasure, were therefore enacted against all people of the King's legiance who should 'draw any out of the realm in plea, whereof the cognisance pertaineth to the King's court, or of things whereof judgments be given in the King's court, or who do sue in the court of another, to defeat or impeach the judgments given in the King's court,' and who should fail to appear, within two months after summons, before the King and his Council, or in his Chancery, or before the

[1] 25 Edw. III. st. 4. [Rev. Stat. I. 177.]

King's justices, to answer in their proper persons for the contempt so committed.[1]

These statutes defied or evaded.

Statutes, however, were of little avail. The law still continued to be defied, or evaded, although several fresh Acts of Parliament to the same effect as the former were promulgated from time to time.[2]

Former prohibitions re-enacted with special provisions against excommunications from Rome. 13 Ric. II. st. 2, c. 3. 1389.

In 1389, there was an expectation that the Pope was about to attempt to enforce his claims, by excommunicating those who rejected them. The Parliament at once passed a highly penal statute, which, besides re-enacting in the most emphatic terms the former prohibitions of Papal aggressions, declared that 'if any man bring or send within the realm, or the King's power any summons, sentences, or excommunications against any person of what condition that he be,' because of his assent to or execution of the statute of Provisors, he should incur pain of *life* and member, with forfeiture of lands and goods; and if any prelate should execute such sentences or excommunications, his temporalities should be taken from him, and abide in the King's hands till redress and correction be made.[3]

Boniface IX. brings matters to a crisis. 1391.

Matters were shortly afterwards brought to a crisis by Boniface IX., who, after declaring the statutes enacted by the English Parliament null and void, granted to an Italian Cardinal a prebendal stall at Wells, to which the King had already presented. Cross suits were at once instituted by the two claimants in the Papal and English courts. A decision was given by the latter, in favour of the King's nominee, and the Bishops, having agreed to support the Crown, were forthwith excommunicated by the Pope.

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[1] Revised Statutes, 27 Edw. III. stat. i., [i. 193]. From this statute originated the offence afterwards known as *Praemunire*, from the words of the writ *praemunire facias*, requiring the sheriff to warn the accused to appear and answer the contempt on a day fixed.

[2] 38 Edw. III., st. 2; 3 Ric. II., c. 3; 7 Ric. II., c. 12; 12 Ric. II., c. 15.

[3] 13 Ric. II., st. 2.

The Commons were now roused to the highest pitch of indignation. They drew up, in the form of a petition to the King, a declaration of the circumstances which had occurred, and affirmed that 'the said things so attempted, be clearly against the King's crown and his regalty, used and approved of the time of all his progenitors, wherefore they and all the liege Commons of the said realm will stand with our said lord the King, and his crown, and his regalty, in the cases aforesaid, and in all other cases attempted, in all points to live and to die.' After this emphatic assertion of their own opinion, they prayed the King, 'and required him by way of justice,' to examine severally all the Lords Spiritual and Temporal in the Parliament how they thought and how they would stand. The lay Lords answered directly, and the Spiritual Lords indirectly, to the same effect as the Commons.[1] Whereupon the petition and the separate declarations of the three estates of Parliament were incorporated in the great Statute of *Praemunire.* It was enacted, that 'if any man purchase or pursue . . . in the court of Rome, or elsewhere, such translations, processes, and sentences of excommunications, bulls, instruments, or any other things whatsoever, which touch the King, against him, his crown, and his regalty, or his realm, as . . . aforesaid, and they which bring them within the realm, or them receive, or make thereof notification or other execution whatsoever within the realm or without, that they, their notaries, procurators, maintainers, abettors, fautors, and counsellors, should be put out of the King's protection, and their lands and tenements, goods and chattels, forfeit to our lord the King; and that they be attached by their bodies, if they might be found, and brought before the King and his council, there to answer to the cases aforesaid, or that process be made against them by *praemunire facias* in manner as it is ordained in other statutes of provisors against those which do sue in the

Petition of the Commons. They declare they will stand by the King to live and die.

The Lords spiritual and temporal are interrogated and answer to the same effect.

Statute of Praemunire 16 Ric. II., c. 5. 1392.

[1] Rot. Parl., iii. 304.

court of another in derogation of the regalty of our lord the King.'[1]

Boniface yields.

The firm and resolute attitude assumed by the country caused Boniface to yield; 'and for the moment,' observes Mr. Froude, 'and indeed for ever under this especial form, the wave of papal encroachment was rolled back. The temper which had been roused in the contest, might perhaps have carried the nation further. The liberties of the crown had been asserted successfully. The analogous liberties of the church might have followed; and other channels, too, might have been cut off through which the papal exchequer fed itself on English blood. But at this crisis, the anti-Roman policy was arrested in its course by another movement, which turned the current of suspicion, and frightened back the nation to conservatism. While the crown and the parliament had been engaged with the pope, the undulations of the dispute had penetrated down among the body of the people, and an agitation had been commenced of an analogous kind against the spiritual authorities at home. . . . This form of discontent found its exponent in John Wycliffe, the great forerunner of the Reformation, whose austere figure stands out above the crowd of figures in English history, with an outline not unlike that of another forerunner of a greater change. . . . The burden of Wycliffe's teaching was the exposure of the indolent fictions which passed under the name of religion in the established theory of the church. He was a man of most simple life; austere in appearance, with bare feet and russet mantle. . . . By the contagion of example he gathered about him other men who thought as he did; and gradually, under his captaincy, these "poor priests," as they were called . . . spread out over the country as an army of missionaries to preach the faith which they found in the Bible—to preach, not of relics and of indulgences, but of repentance and of the grace of God. They carried with them copies of the Bible, which Wycliffe had translated,

Rise of the Lollards.

John Wycliffe, 1360;

and his 'poor priests.'

The Bible translated and disse-

[1] 16 Ric. II., c. 5; Stat. of the Realm, ii. 85 [Rev. St. i. 263].

leaving here and there, as they travelled, their costly treasures, as shining seed-points of light; and they refused to recognise the authority of the bishops, or their right to silence them. If this had been all, and perhaps, if Edward III. had been succeeded by a prince less miserably incapable than his grandson Richard, Wycliffe might have made good his ground; the movement of the parliament against the pope might have united in a common stream with the spiritual move against the church at home, and the Reformation have been antedated by a century.'[1]

minated among the people.

But the 'poor priests' had other doctrines besides those which they found in the Bible. The tenets of Wycliffe himself were not free from revolutionary tendencies, though probably intended by him, so far as regarded temporal matters, as mere idealistic theories; his followers superadded, and propagated among their ignorant proselytes, wild Socialistic views which did much harm, not only to their cause but to the reputation of their master. Although there is no evidence that Wycliffe himself had any hand in exciting the insurrection of the Villeins in 1381, the complicity of many of his followers, the Lollards, is undoubted. John Balle, the fanatical leader of the insurgents, is said to have confessed before his execution, that he had been for two years a pupil of Wycliffe, and had imbibed his views on the Eucharist.[2] The insurrection was in fact a great blow to Wycliffe and the Lollards. Now that it was seen that they had become political revolutionists as well as religious reformers, a reaction set in. In the Parliament which met in May, 1382, Archbishop Courtenay procured a statute to be irregularly passed, without the assent of the Commons, ordering that commissions should issue out of the Chancery

Revolutionary and Socialistic tendencies of Wycliffe's followers.

They are implicated in the insurrection of the Villeins in 1381.

Conservative reaction in consequence.

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[1] Froude, Hist. Eng., ii. 12–15.

[2] Fasciculi Zizaniorum Magistri Johannis Wyclif, edited by Canon Shirley (Rolls Series, p. 273). [Hardwick, *Ch. Hist.*, *Middle Age*, p. 412, says of John Balle that Knyghton calls him a 'precursor' of Wycliffe, but never intimates that the two were acting in concert. Robertson, *Hist. Chr. Church*, viii. p. 280, referring to the alleged confession, says, 'in truth, this connexion between Balle and Wycliffe was imaginary.'—ED.]

directing the sheriffs to arrest all persons certified by the Bishops to be preachers of heresy, and their abettors, and to keep them in prison 'until they will justify themselves according to reason and the law of Holy Church.'[1] Prosecutions followed; but Wycliffe petitioned against the measure, and in the succeeding Parliament the Commons demanded and obtained its repeal, on the ground that their assent had never been given.[2]

Henry IV. supports the Prelates.

During the remainder of Richard's reign, after the panic of the insurrection had subsided, the Lollards, though no longer favoured by the Court and nobility, were very little molested. It was the policy of Henry IV. to gain the support of the Prelates by sustaining them against their new adversaries, who, moreover, as disturbers of order, were equally obnoxious to the secular power.[3] With this object was passed, in the second year of his reign, at the instigation of Archbishop Arundel, the celebrated statute *De Haeretico Comburendo.* The preamble recites that 'divers false and perverse people, of a certain new sect, of the Faith, of the Sacraments of the Church, and the authority of the same, damnably thinking, and against the law of God and of the Church usurping the office of preaching, do perversely and maliciously in divers places within the said realm, under colour of pretended holiness, preach and teach in these days, openly and privily, divers new doc-

[Pretended] Statute *De Haeretico Comburendo.* 2 Henry IV. c. 15. 1401.

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[1] 5 Ric. II., st. 2, c. 5, Stat. of the Realm, ii. 26.

[2] In this statute, or rather ordinance, the assent of Lords and Commons is not expressed ('it is ordained and assented in the present Parliament'). In the next Parliament, which met in October of the same year, 1382, the Commons, reciting this statute, declare it was never assented to or granted by them, but that what had been proposed in this matter was without their assent, and pray that the statute may be annulled; for it was never their intent, they said, to be judged by, or to bind themselves or their descendants to, the bishops more than their ancestors had been bound in times past. The King returned an answer agreeing to their petition. (Rot. Parl., 5 Ric. II., iii. 141; Hallam, Mid. Ages, iii. 89.) Nevertheless the pretended statute remained on the statute book, and was not formally repealed until the passing of the Stat. Law Revision Act, 1863.

[3] At the same time that Henry IV. was supporting the National Church against domestic adversaries, he was careful to maintain the policy of resistance to the aggressions of the Pope. See statutes 2 Hen. IV. c. 3; 2 Hen. IV. c. 4; 5 Hen. IV. c. 11; and 9 Hen. IV. c. 9.

trines, and wicked, heretical, and erroneous opinions, contrary to the same faith and blessed determinations of Holy Church. And of such sect and wicked doctrine and opinions they make unlawful conventicles and confederacies; they hold and exercise schools; they make and write books; they do wickedly instruct and inform people; and, as much as they may, incite and stir them to sedition and insurrection . . . the diocesans and their jurisdictions spiritual, and the Keys of the Church with the censures of the same, they do utterly contemn and despise; and so their wicked preachings and doctrines continue from day to day, to the hatred of right and reason, and utter destruction of order and good rule.' To remedy these evils it was enacted, that the Bishops, at their mere will and pleasure, should have power to arrest and imprison persons defamed or vehemently suspected of such offences, until they should make canonical purgation; and, if convicted, to punish them with fine and imprisonment. And if any person so convicted should refuse to abjure such preachings, doctrines, opinions, schools, and misinformations, or, after abjuration, should be proved to have relapsed, then the sheriff of the county, or the mayor and bailiffs of the nearest borough should, on requisition, be present at the pronunciation of the sentence, should receive the persons so condemned into custody, 'and them before the people, in an high place, do to be burnt, that such punishment may strike in fear to the minds of others.'[1]

The Commons petition the Crown for a secularisation of Church property.

There seems little doubt that the Commons were not assenting parties to this burning statute. Throughout the whole of Henry IV.'s reign they manifested a very hostile spirit to the clergy; and on two occasions, in 1404 and again in 1410, they proposed that the temporalities of the Church should be confiscated to the use of the State: but the

[1] 2 Hen. IV., cap. 15, A.D. 1401; Stat. of the Realm, ii. 125. The writ *De Haeretico Comburendo*, [with] 'all process and proceedings thereupon, and all punishment by death in pursuance of any ecclesiastical censures,' [was] finally abolished by statute, 29 & 30 Car. II., c. 9.

Insurrection of the Lollards under Sir John Oldcastle. 1412.

King refused to countenance the scheme.[1] The abortive insurrection of the Lollards at the commencement of Henry V.'s reign, under the leadership of Sir John Oldcastle, had the effect of adding to the penal laws already in existence against the sect. In a Proclamation, the King asserted that the insurgents intended 'to destroy him, his brothers, and several of the spiritual and temporal lords, to confiscate the possessions of the church, to secularise the religious orders, to divide the realm into confederate districts, and to appoint Sir John Oldcastle president of the commonwealth.' In 1414 a statute was passed which, after reciting that 'great rumours, congregations and insurrections of people here in the realm of England, by divers of the King's liege people, as well by them which were of the sect of heresy commonly called Lollardry, as by other of their confederacy, excitation, and abetment, now of late were made to subvert the Christian faith, and the law of God, and Holy Church, to destroy the King and all the Estates of the Realm, and also all manner of policy, and finally the laws of the land,' enacted that the Lord Chancellor, the Judges, and all magistrates, should be sworn to use their best power and diligence to detect and arrest persons suspected of Lollardry, and deliver them over to the Ecclesiastical courts; and that the prisoners on conviction should forfeit lands, goods and chattels, as in cases of felony.[2]

Lollardry repressed but not extinguished.

Although repressed and discredited, Lollardry was by no means extinguished. Henry VI., in 1431, writes of the Lollards 'as God knoweth, never would they be subject to His laws nor to man's, but would be loose and free to rob, reve and despoil, slay and destroy all men of thrift and worship, as they proposed to have done in our father's days; and of lads and lurdains would make lords.'[3] The

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[1] Walsingham, 379. From the superfluous revenues of the Church, the Commons asserted that the King might maintain 15 earls, 1500 knights, and 6200 esquires; and also support 100 hospitals for the relief of the poor.

[2] 2 Hen. V., c. 7. 1415.

[3] Archaeologia, vol. xxiii. p. 339 *seq.*

revolutionary tendencies of the Lollards were indeed effectually crushed out; but 'the fire of heresy continued to smoulder,' and copies of Wycliffe's Bible were still read in secret with fear and trembling. During the troubled period of the Wars of the Roses we hear little of heretical doctrines,[1] but from the beginning of the 16th century the records of the Bishops' courts are filled with accounts of prosecutions for heresy. In the first years of Henry VIII. several persons were burnt for this crime, while others only escaped by abjuring their errors. About the same time the mantle of Wycliffe's 'poor priests' was taken up by a society in London calling itself 'The Association of Christian Brothers.' 'It was composed,' says Mr. Froude, 'of poor men, chiefly tradesmen, artisans, a few, a very few of the clergy; but it was carefully organized, it was provided with moderate funds, which were regularly audited: and its paid agents went up and down the country carrying Testaments and tracts with them, and enrolling in the order all persons who dared to risk their lives in such a cause.'[2] Even those persons who felt no sympathy with the doctrines of Lollardry, had been long disgusted with the vices and exactions of the Papal See, with the inordinate wealth, privileges, and encroaching temper of the clergy, and the abuses of the Ecclesiastical courts.

It revives at beginning of 16th century.

The 'Association of Christian Brothers.'

Even the orthodox are disgusted with the exactions of the Papacy and the abuses of the Ecclesiastical system.

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[1] [One Bishop, the single defender of the clergy of England against the 'over much blaming of the Lollards,' Reginald Pecock, shared the fate of some other apologists by being accused of favouring the heresies which he had set himself to confute. Hardwick (*Church History. Middle Age.* 1861, p. 424) speaks of Pecock as the 'only writer who applied himself in earnest to convert the Lollards by the use of candid arguments,' but says that 'his moderation was almost fatal to him.' Robertson (*Hist. Chr. Church*, viii. 349–54) says that 'in some respects Pecock may be regarded as standing midway between the doctrines of Rome and those of the English Reformation.' He deserves to be held in honour at least on this one point brought out by Robertson, that he was 'an advocate of toleration in an age when intolerance was regarded as a duty to the truth.' With regard to his condemnation, it may be noted that he had exposed the Donation of Constantine by a clear historical argument, independently of Valla. The statement (*ap.* Hardwick, *loc. cit.*) quoted from 'an old chronicler,' by Leland, 'male sensit de Eucharistia,' may indicate no more than doubts as to the Definitions of the 4th Lateran Council. Whether Pecock was deprived, or whether he resigned the see of Chichester, is left uncertain by Robertson, *loc. cit.*, but 'episcopatu Cicestrensi privatus' is in *Three 15th Cent. Chron.* (Camd. Soc.), 168.—ED.]

[2] Froude, Hist. Eng., ii. p. 26.

Benefit of clergy.

One of the most mischievous of clerical privileges was the immunity of all tonsured persons from civil punishment for crimes. This had been partially restrained under Henry VI., by requiring that clerks arrested on any criminal charge, instead of being instantly claimed by the Bishop, should plead their privilege at the time of arraignment, or after conviction. Under Henry VII. all clerks convicted of felony were ordered to be burned in the hand: and in 1513, the 'benefit of clergy' was entirely taken away from murderers and felons.[1] The immunity was, however, still enjoyed by priests, deacons, and subdeacons.

Dr. Standish and Convocation. [Cf. *App.* D.]

In 1515, Dr. Standish, having denied the right of clerks to be exempt from the jurisdiction of the King's courts, was attacked by Convocation; whereupon Parliament petitioned the King to support him against his enemies. The King, after hearing both sides, decided in favour of Standish.

Case of Richard Hunne.

About the same time popular indignation was greatly excited against the clergy by the case of Richard Hunne, a citizen of London, who having sued a clerk, in a Civil court, for illegal extortion, was, by way of retaliation, prosecuted in the Bishop's court for heresy, and having been committed to the Bishop's prison, was found hanged in his chamber. The Bishop's chancellor and sumner were indicted for the murder on such vehement presumption, that, a conviction being almost certain, the Bishops appealed to the King to defer the trial, declaring that the London juries were so prejudiced against the Church that they would find Abel guilty of the murder of Cain; and that the clergy ought to have time to enquire of the Court of Rome whether submission to Civil courts was consistent with the laws of God and the liberties of Holy Church. In reply Henry declared that 'By the permission and ordinance of God, we are King of England; and the kings of England in times past never had any superior but God only. Therefore, know you well, that we will maintain the right of our crown, and of our

[1] 4 Hen. VIII., sess. 2, c. 2.

temporal jurisdiction, as well in this as in all other points, in as ample a manner as any of our predecessors have done before our time.'[1]

Luther at Wittenberg, 1517.

Such was the state of popular feeling in England when Martin Luther nailed his theses to the church door of Wittenberg, and set in motion that mighty religious revolution, which, while it has to some extent affected the destinies of all Western nations, has in an especial manner influenced the religious and political development of the English people.[2]

Henry predisposed to curb Ecclesiastical abuses, but opposed to Doctrinal changes.

Inclined as a man of Henry's intelligence and force of character must have been to reform the abuses of the Ecclesiastical system and curb the excesses of clerical power, he was altogether opposed to Doctrinal innovations. In defence of Orthodoxy he even condescended to a polemic contest with Luther, and for the treatise, *Assertio Septem Sacramentorum adversus Martinum Lutherum*, received from Pope Leo X. the title of 'Defender of the Faith.' But among the people the writings of the 'arch-heretic,' and of other foreign reformers, were sedulously circulated by the 'Christian Brothers,' until at length, under Edward VI. and Elizabeth, English Lollardism, stimulated and developed by the influence of Germanic Protestantism, brought about the Doctrinal, as Henry VIII. had brought about the Political and Legal, reformation of the National Church. Some reform of the Ecclesiastical system, and even of the doctrines of the Church, must certainly have been carried out at no great distance of time, even had no quarrel arisen between Henry VIII. and the Papacy.[3] The crisis was precipitated by the famous Divorce suit against Queen Catherine. It is unnecessary here to discuss the merits of the case, or to dwell upon the vacillation and duplicity of Pope Clement VII., 'the assurances he gave the King, and the arts

His book against Luther gains him the title of Defender of the Faith, 1521.

Influence of the writings of Luther and other foreign Reformers on English Lollardism.

Some reform of the Ecclesiastical system was inevitable.

Precipitated by the Pope's action in the King's Divorce suit against Queen Catherine.

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[1] Burnet, Hist. Reformation, i. part 1.

[2] See Macaulay, Hist. Eng., i. [49].

[3] [The General Councils of the West in the Fifteenth Century would alone suffice to prove this. Their uniform cry was for 'Reform of the Church in Head and Members.'—ED.]

with which he receded from them, the unfinished trial in England before his delegates, Campeggio and Wolsey, the opinions obtained from foreign universities in the king's favour, not always without a little bribery, and those of the same import at home, not given without a little intimidation, or the tedious continuance of the process after its adjournment to Rome.'[1]

Progress of events.

More than five years elapsed between Henry's first application to the Pope, in 1527, for a Bull annulling his marriage with Catherine as being originally contrary to the laws of God, and the celebration of his marriage with Anne Boleyn in November or January, 1532–3.[2] On the 12th of April, 1533, the marriage was publicly owned; on the 23rd of May, Archbishop Cranmer pronounced sentence of divorce from Catherine; and on the 7th September following Anne became the mother of Elizabeth. On the 23rd of March, 1534, the Pope, urged by the Cardinals to extreme measures, pronounced a definite sentence in favour of Catherine, and required the King under pain of excommunication, to take her back as his wife. Henceforth, the breach between the King and the Pope was irreparable; but long before the final rupture Henry had entered upon the course of Ecclesiastical reform, which was retarded or accelerated as the progress of the great suit seemed to call for a conciliatory or threatening attitude on the part of the King.

The *Reformation Parliament*, 1529–36.

It is remarkable that the seven years' legislation which abolished the Papal supremacy in England, reformed the constitution and administrative system of the Anglican Church, and established the Royal supremacy, was the work of one and the same Parliament. The 'Reformation Parliament' met in London on the 3rd November, 1529, after an illegal intermission of the National Council for seven years, and, with the exception of a single session,

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[1] Hallam, Const. Hist., i. 61.

[2] [Green, *Hist. of the English People*, 1878–80, ii. p. 157, gives 'the spring of 1533,' as the date of Henry's marriage with Anne Boleyn.—ED.]

for fourteen years. It was continued by prorogations—unusual in those days—from year to year, until it was finally dissolved on the 14th April, 1536, having completed the task for which it had been specially summoned.

We shall consider the Ecclesiastical reforms of the Reformation Parliament in the chronological order of its seven sessions.

Session I. 1529. Petition of the Commons for a systematic scrutiny into Ecclesiastical abuses.

Soon after the meeting of Parliament a petition was presented to the King, in the name of the Commons of England, containing what was in fact a formal 'Acte d'accusation,' with a detailed summary of grievances, against the clergy generally and the Bishops in particular. This address disclosed the design of a systematic scrutiny into all the abuses which had been imputed to the Anglican Church. It is evident from the King's conduct and observations with regard to it, that he favoured, and had possibly originated, the bold and novel enquiry. The ever-present difficulty of reconciling the Papal pretensions with national independence is also clearly brought out. It was the divided allegiance of the Bishops which especially struck Henry's mind, and which for national as well as personal reasons he was so anxious to determine. He doubtless saw that, in the impending struggle, the oaths sworn by the prelates to the Pope would afford them but too ready an excuse for taking part against him.[1]

It is referred to the Bishops for an answer.

The address of the Commons was referred by the King to the Bishops, with a request that they would immediately answer its charges. After some delay, the Bishops replied in a lengthy document, which was handed by the King

[1] See Andrew Amos, Statutes of the Reformation Parliament, 232. Mr. Amos remarks of the Statutes of Henry's reign, that 'their parentage is less that of deliberate assemblies than of an individual author, whose dictates and expressions have a marked peculiarity of sentiment and tone.' The *Preambles* are 'prolix, diffuse, and redundant beyond all former example, as if, apparently, to guard the enacting clauses from misrepresentation of motives rather than misinterpretation of texts. They generally consist of reasonings and facts upon which it was professed that the statutes were grounded; they exhibit, with greater probability of truth, the lights in which it was desired that the nation should view them, without conjectures to the right hand or the left.' [Amos, *op. cit.*] pp. 3, 9.

to the Commons with the remark, 'We think their answer will smally please you, for it seemeth to us very slender.'

Henry's criticism on the Bishops' answer.

A few days later, 'the King sent for the Speaker again, and twelve of the Commons House, having with him eight lords, and said to them, Well-beloved subjects! we thought that the clergy of our realm had been *our* subjects wholly, but now, we have well perceived that they be but *half our subjects;* yea, and scarce our subjects, for all the prelates, at their consecration, take an oath to the Pope clean contrary to the oath they make to us, so that they seem to be *his* subjects and not *ours.* Copies of both the oaths I deliver here to you, requiring you to invent some order that we be not thus deluded of our spiritual subjects.' The Speaker then departed and caused the two oaths to be read in the Commons House.[1]

Statutes in restraint of Probate fees;

Three statutes were passed in the first session in restraint of the personal privileges and emoluments of the clergy.

(1) The fees, hitherto assessed at discretion, upon the granting of probates and administration by the ecclesiastical courts were reduced to fixed and moderate proportions.

This was a mode of ecclesiastical extortion which had been long and bitterly resented. A statute of the 31st year of Edward III. (st. 1, c. 4) had been passed to repress the 'outrageous and grievous fines and sums of money taken by the ministers of bishops and other ordinaries[2] of Holy Church, for the probate of testaments;' and another statute of the 3 Hen. V. c. 8, had been made temporary only by reason that 'the ordinaries did then promise to reform and amend the oppressions and exactions complained of;' but as the abuse still continued, 'nothing reformed nor amended but greatly augmented and increased against

[1] Hall, cited by A. Amos, p. 233.

[2] The term *Ordinary* is generally synomymous with Bishop; but it includes every ecclesiastical judge who has the regular *ordinary* jurisdiction independent of another. Co. Litt. 344.

right and justice,' it was now effectually restrained by this statute of Henry's reign.[1]

(2) The mortuary fees, or 'corse presents,' of the parochial clergy were regulated. After reciting that these fees had been 'over excessive to the poor people and other persons of this realm, and also had been demanded and levied for such as at the time of their death have had no property in any goods or chattels, and many times for wayfaring travelling men in the places where they have fortuned to die;' the statute fixed the fees on a graduated scale, from three shillings and fourpence up to ten shillings, according to the value of the deceased person's property, but with an entire exemption in the case of married women, children, persons not keeping house, and wayfaring men.[2] of Mortuaries;

(3) Pluralities, non-residence, farming and trading by the clergy were forbidden. It was enacted that no clergyman should thenceforth take any land to farm beyond what was absolutely necessary for the support of his own household; or should buy merchandise to sell again; or keep tanneries or brewhouses,[3] or otherwise directly or indirectly trade for gain. Pluralities were not to be permitted with respect to benefices above the yearly value of £8; and residence was made obligatory. Papal and Episcopal dispensations [for] pluralities and non-residence were declared illegal, and persons procuring them rendered liable to heavy penalities: but power was reserved to the King to sell such dispensations to a numerous list of chaplains (of the King, the nobility, the judges, and other officials), to the brothers and sons of temporal peers and of knights, and to persons holding the degree of Doctor or Bachelor of Divinity or Law. The Crown thus acquired of Pluralities, non-residence, and clerical trading.

[1] 21 Hen. VIII. c. 5.
[2] 21 Hen. VIII. c. 6.
[3] The Commons, in a petition to the King concerning clerical abuses, had made a particular complaint of reverend tanners and brewers. A. Amos, Statutes of Hen. VIII. p. 237.

a powerful means—hitherto enjoyed by the Pope—of influencing the lower House of Convocation.

Session II. 1530–1.

In this Session no statute directly aimed at either Pope or clergy was passed. But in an Act for the punishment (by whipping, pillory, and loss of ears) of beggars and vagabonds, were significantly included 'all *Proctors* and *Pardoners* going about the country without sufficient authority.'[1] Proctors were officers of the Ecclesiastical courts analogous to attorneys of the Civil courts; Pardoners were the itinerant vendors of Indulgences and relics from the Court of Rome.

Proctors and Pardoners punished as vagabonds.

The clergy in a *Praemunire.*

This was followed by the Act for the pardon of the clergy in the matter of the *praemunire* to which they were very harshly and unfairly held to have rendered themselves liable, in consequence of admitting the Legatine authority of Cardinal Wolsey. The Cardinal had been indicted in Oct. 1529, upon the Statute of *Praemunire* of the 16th Richard II., for having obtained Bulls from Rome, which he caused to be publicly read, and by which he exercised jurisdiction and authority Legatine, to the deprivation of the King's power established in his courts of justice. Wolsey had been careful to obtain the King's licence under the Great Seal authorising him to exercise the Legatine authority, and although the King may be considered to have exceeded his legal right in granting such a licence, still, as the Dispensing power had been continuously claimed and frequently exercised by the Crown, both with respect to the Statutes of *Praemunire* and others, there was equally an equitable and moral if not a legal defence to the charge.[2] Wolsey, however, thinking it prudent not to plead his Royal licence, was found guilty on his own confession; and after being plundered, received the King's pardon. It was now contended, on the ground of his conviction, that all the

[1] 22 Hen. VIII. c. 12.

[2] It had been decided in Henry VII.'s reign, that although the King could not dispense with penalties for an act against the common law, he could do so with respect to an act prohibited by statute only. See *supra*, p. 331.

clergy of the realm had been guilty of *praemunire*, because by admitting the jurisdiction they had become, in the language of the statute, his 'fautors and abettors;' and the Attorney-General was instructed to file an information against the whole clerical body in the Court of King's Bench. The Convocation of Canterbury hastily assembled, and offered the King £100,000 in return for a full pardon. This offer the King refused to accept, unless in the preamble of their petition he was acknowledged to be 'the protector and only supreme head of the church and clergy of England.' After much discussion, the King finally consented to accept the acknowledgment of his supremacy with the qualifying words, 'so far as the law of Christ will allow.' The Convocation of York adopted the same language, and voted, for a like pardon, the sum of £18,840.[1]

Pardoned on payment of a large sum and admitting the King's supremacy.

It is remakable in a reign when the power of the Crown was at its highest, and when Parliament even delegated to the King its legislative functions, that the King should have admitted his Parliament to participate in the undoubted Royal prerogative of pardoning offences. The unusual character of a pardon granted to a whole estate of the realm may have been a reason for a special Parliamentary sanction, and, moreover, until the clergy had been found guilty by a court of law a pardon from the King alone would have been in fact an exercise of the Dispensing power which had already proved so poor a protection to Wolsey. But a difficulty arose in the passage of the Bill of Pardon through the Lower House. The comprehensive words of the Statute of *Praemunire*, applied not only to the clergy but to the Privy Council, the Lords and Commons, and indirectly to the whole nation, as having recognised Wolsey in his capacity as Legate. The Commons, therefore, fearing that the King might make the alleged *praemunire* an excuse for fleecing the laity as well as the clergy, boldly refused to pass the Bill for the pardon of the

The laity also in a *Praemunire*.

The Commons insist on a pardon to the laity,

[1] 22 Hen. VIII. c. 15; 23 Hen. VIII. c. 19.

latter, 'unless all men might be included, arguing that every man who had anything to do with the cardinal was in the same case.' The Speaker and a number of members subsequently waited upon the King, and in more submissive language declared 'that his faithful Commons sore lamented and bewailed their chance, in having occasion to think or imagine themselves out of his favour, because he had granted his most gracious pardon to his spiritual subjects for the praemunire and not to them; wherefore they most humbly besought his majesty out of his wonted goodness and clemency to include them in the same pardon.' The King replied, 'that he was their prince and sovereign lord, and that they ought not to restrain him of his liberty, nor compel him to show his mercy. Wherefore, since they had denied to consent to the pardon of his spiritual subjects, which he said he might give without their consent, under his great seal, he would be well advised before he pardoned them, because he would not have it look as if he was compelled to do so.'[1] However, a pardon to the laity was signed by the King, and embodied in an Act of Parliament, by which his majesty 'of his mere notion, and of his benignity, special grace, pity, and liberality, hath granted, and *by the authority of the present Parliament* granteth to *all and singular his temporal and lay subjects* and temporal bodies politic and corporate, and to every one of them, his pardon for offences against the Statutes of *Provisors* and *Praemunire*.' This pardon of a whole nation is not only one of the most extraordinary events of this extraordinary reign, but it is probably unparalleled in history. It was all the more preposterous from the circumstance that, in effect, the Lords and Commons pardoned themselves.[2]

which is granted by Act of Parliament.

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[1] Hall, cited by A. Amos, Reformation Parliament, p. 61.

[2] Amos, p. 62. The pardon to the clergy of the Province of Canterbury was by Stat. 22 Hen. VIII. c. 15, the pardon of the laity by 22 Hen. VIII. c. 16; the pardon of the clergy of York Province by 23 Hen. VIII. c. 19, passed in the following session. For recent views of the *Praemunire* thus presumed to have been incurred, and of the submission of the clergy to the King's

These proceedings took place in the early part of the year 1531, while the King's representatives at Rome were still pressing, though with diminished hopes, for a favourable termination of the King's suit. In the next session of Parliament, while the clergy were still under the terror of their recent narrow escape from the penalties of a *praemunire*, the attack upon the Papal and Ecclesiastical privileges was vigorously but cautiously renewed.

Session III. 1531–2. Act to restrain the citation of persons out of the diocese in which they reside.

(1) An Act was passed to restrain the citation of persons out of the dioceses in which they were resident. The preamble recites that great number of the King's subjects as well men, wives, servants, as others, dwelling in divers dioceses of England and Wales, have been at many times called by citation and other processes compulsory to appear in the Arches audience and other high courts of the archbishops of this realm, far from their dwellings, and many times to answer to surmised and feigned causes, and suits of defamation, withholding of tithes, and such other like causes and matters, which have been sued more for malice and for vexation than for any just cause of suit; and not appearing they are excommunicated, or at least suspended from all divine services, and can only be absolved on payment of the fees of court, and also to the 'summoner, apparitor, or other light literate person' by whom they were certified to be summoned, a further sum for every mile distant from the court to the residence of the party. It was therefore enacted that with certain exceptions, no person should be summoned out of the diocese in which he resided, and the fee for a citation was reduced from two shillings to threepence.[1]

Annates or first-fruits taken from the Pope.

(2) Shortly afterwards an Act was passed depriving the Pope of the Annates, or first-fruits of benefices.[2] It

supremacy, see Dixon's Hist. of the Church of Eng. vol. i. (1529–37), p. 53 *et seq.*, and the *Quarterly Review*, Oct. 1879, Art. The Submission of the Clergy. [Cf. also, on the whole period, Brewer's *Henry VIII.*, ed. by Gairdner.—ED.]

[1] 23 Hen. VIII. c. 9.

[2] [Annates are stated by Hardwick, *Church Hist.*, *Middle Age*, 1861, p. 346, *n.* 3, to have been instituted by John XXII. (1316–34), who 'accumulated in this way a prodigious treasure,' and of whom Giovanni Villani, *Hist. Fiorent.*

recites that the Pope's holiness, his predecessors, and the court of Rome, by long time had theretofore taken of all archbishops and bishops elected within this realm of England annates or first-fruits; which they were compelled to pay before they could receive the Pope's bulls for their elections to be confirmed; but such annates had risen, grown, and increased by an uncharitable custom grounded upon no just or good title, and the payment thereof enforced by the restraint of bulls against all equity and justice: therefore the noblemen of this realm and the wise, sage, politic Commons of the same, considering that the court of Rome ceaseth not to tax, take and exact the said annates—which were first suffered to be taken within this realm for the only defence of Christian people against the Infidels, but now be claimed as mere duty only for lucre, against all right and conscience. . . . And albeit that the King and all his subjects, spiritual and temporal, be as obedient, devout, catholic and humble children of God and Holy Church as any people be within any realm christened; yet the said exactions of annates be so intolerable and importable that it is considered and declared by the whole body of this realm now represented by all the states of the same assembled in the present Parliament, that the King's Highness before Almighty God is bound, as by the duty of a good Christian Prince, for the conservation of the good estate and commonwealth of this his realm, to do all that in him is, to obviate, repress and redress the said abusions and exactions of annates. It was thereupon enacted that the payment of annates should cease; that any Bishop making such payments should forfeit all his lands and goods to the King; that if any Bishop pre-

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l. ix. c. 58, is cited by Hardwick, *u.s.*, as saying 'Questi fu huomo molto cupido di moneta e simoniaco, che ogni beneficio per moneta in sua corte si vendea.' It is noticed by Greenwood, *Cath. Petri*, Supp. vol. 553, *n.* d, that the Statutes of *Praemunire* and Provisors left untouched 'those charges which pressed most severely upon the beneficiaries, such as confirmations, annates, first-fruits, &c.' In this matter, therefore, the Reformation Parliament of Henry VIII. was but carrying out to its logical completion the work commenced under Edward III. and Richard II.—ED.]

sented by the King to the Pope should be letted or delayed through withholding of Bulls, he should be consecrated in England by the Archbishop; that every Archbishop presented by the King and from whom the Pope should withhold the necessary Bulls, should be consecrated by two Bishops to be nominated by the King; that Bishops so consecrated should be installed, accepted, and obeyed, and should enjoy their spiritualities and temporalities as completely as if they had obtained their Bulls from Rome; and that any censures, excommunications, or interdicts issued in consequence by the Pope should be utterly disregarded. A remarkable proviso was added, evidently with the object of influencing the Pope in the negotiations for the Divorce still pending at Rome. 'Forasmuch as the King and the Parliament did not intend to use in this or any other like cause, extremity of violence, before gentle courtesy and friendship first attempted,' it was further enacted that, in order to come to an amicable composition with the Pope, the King should have power to declare by his letters patent, before the beginning of the next session of Parliament, 'whether the premises or any part, clause or matter thereof,' should be observed and take effect as a statute or not.[1]

Session IV. 1532–3.

The fourth session of Parliament began on the 4th of February. The King had been secretly married to Anne Boleyn in the January, or November, preceding; and arrangements were in contemplation for the sentence of Divorce from Catherine which Archbishop Cranmer pronounced in the ensuing May. It was probably with the view of quashing Queen Catherine's pending appeal to Rome, and also, prospectively, any appeal which she might make against the Archbishop's sentence, that an Act was now passed forbidding, under the penalty of *praemunire*, all appeals from the Spiritual Judges in England to the Court of the Pontiff.[2] In a curious and lengthy preamble

Act for the restraint of Appeals to Rome.

[1] 23 Hen. VIII. c. 20.

[2] [Hardwick, *Hist. Christ. Ch.*, *Middle Age*, 1861, 245, and *n.* 6, dealing with

it is recited that By divers and sundry old authentic histories and chronicles it is manifestly declared that this realm of England is an *Empire*, and so hath been accepted in the world, governed by one supreme Head and King having the dignity and royal estate of the imperial crown of the same; unto whom a body politic, compact of Spiritualty and Temporalty, owe next to God a natural and humble obedience. After referring to the statutes of Edward I., Edward III., Richard II., and Henry IV., made to keep 'the imperial crown of this realm from the annoyance as well of the see of Rome as from the authority of other foreign potentates,'[1] and reciting that since those good statutes and ordinances, inconveniences and dangers not provided for plainly therein had arisen and sprung up by reason of appeals to Rome, in causes testamentary, of matrimony and divorces, tithes, oblations and obventions, not only to the great vexation, trouble, costs and charges of the King's Highness and many of his subjects, but also to the great delay and let to the true and speedy determination of the said causes, for so much as the said parties appealing to the said court of Rome, most commonly do the same for the delay of justice: it was therefore enacted —That all causes testamentary, of matrimony and *divorce*, tithes, oblations, and obventions, *already* commenced or hereafter coming in contention, whether they concerned the King, his heirs or successors, or any subjects or resiants of what degree soever they be, should be heard and determined within the King's jurisdiction, and not elsewhere, in such courts, spiritual and temporal, as the case should

the period 1073–1305, notes, as a symptom of the 'desire to elevate and enrich the papacy,' the requirement now extended in all quarters, that appeals, instead of being settled in the courts at home, should pass, almost indiscriminately to the Roman, as the ultimate tribunal of the West.' He also remarks, *n.* 6, *u.s.*, that in England there was always a peculiar jealousy on the subject of appeals, going back, as he shews, *op. cit.*, p. 16, *n.* 1, to the case of Wilfrid, and the attitude towards Rome taken by Ecgfrith and Aldfrith of Northumbria, the latter, while respecting the persons of the Papal Legates, expressly stating 'se . . . assensum legationi omnino abnuere, quod esset contra rationem homini jam bis a toto Anglorum concilio damnato propter quælibet Apostolica scripta communicare,' *Vit. S. Wilf.* c. 48–52, cited *u.s.*—ED.]

[1] *Supra*, pp. 419–26.

require, any inhibitions or excommunications, or processes from the see of Rome notwithstanding; that any person procuring from Rome any foreign process, should incur the penalties of *praemunire;* that the course of appeal should be from the Archdeacon to the Bishop, and from the Bishop to the Archbishop of his province; and that in any case touching the King or his successors, the appeal should be to the Upper house of Convocation.[1]

Session V. 1533-4.

Before the meeting of Parliament for its fifth session, on the 15th January, 1533-4, Archbishop Cranmer had pronounced the divorce of Henry from Queen Catherine, the King's marriage with Anne Boleyn had been publicly acknowledged, and a final breach with the Pope appeared imminent.

Act for the submission of the clergy.

(1) The first important Act passed was one for making the King's assent requisite to the validity of Ecclesiastical canons, and for the more general prohibition of appeals to Rome. The clergy in Convocation had already been induced to promise that they would never from thenceforth enact, promulge or execute, any new canons, constitutions, or ordinances, without the King's licence to make them and his approval of the same when made. By the present statute this submission of the clergy was recorded and confirmed, and the penalty of fine and imprisonment at the King's pleasure imposed upon all who should act contrary to its provisions. Appeals to Rome, which had been already prohibited in certain cases, were now, under penalty of a *praemunire,* forbidden in any case whatsoever; and in lieu of the rights thus abolished it was declared that appeals from the Archbishops' courts should be made to the King in Chancery, and that the King should appoint Commissioners to hear and determine finally in the cause.[2]

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[1] 24 Hen. VIII. c. 12.

[2] 25 Hen. VIII. c. 19, 'An Act for the submission of the clergy to the King's Majesty.' The Delegates of Appeals, as the Commissioners were termed, continued to form the final court for Ecclesiastical appeals, until superseded by the Judicial Committee of the Privy Council under the provisions of

Archbishops and bishops to be nominated by the king's *congé d'élire.*

(2) The statute of 1531, by which the payment of Annates to the Pope had been contingently forbidden, and which had since been ratified by the King's letters patent, was re-enacted, with additional clauses providing a mode of nominating Archbishops and Bishops by *congé d'élire*, which is that now in force. For the future no Archbishop or Bishop was to be presented to 'the Bishop of Rome, otherwise called the Pope,' (the expression in the previous Act was 'our holy Father the Pope') for confirmation, or was to sue out any Bulls in his Court. But at every vacancy of any Cathedral Church the King should grant to the Dean and Chapter a licence under the great seal to elect the person named in the accompanying letters missive, and him they should choose and none other. Should they defer the election for more than twelve days, the King should elect by his letters patent. The prelate so elected or nominated should first swear fealty; after which the King should signify the election to the Archbishop, or if there be no Archbishop, to four Bishops, requiring them to confirm the election and to invest and consecrate the Bishop elect, who might then sue his temporalities out of the King's hands, making a corporal oath to the King and none other,

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2 & 3 Will. IV. c. 92. By the 'Supreme Court of Judicature Act, 1873,' the Queen is empowered, at any time, by Order in Council, to direct that all appeals and petitions, which according to the laws now in force ought to be heard by the Judicial Committee of the Privy Council, shall, from and after a time to be fixed by such order, be referred to and heard by her Majesty's New Court of Appeal constituted by this Act. And the Court of Appeal, when hearing any appeals in Ecclesiastical causes which may be referred to it in manner aforesaid, shall be constituted of 'such and so many of the judges thereof, and shall be assisted by such assessors, being Archbishops and Bishops of the Church of England,' as shall be directed by any general rules to be made by Order in Council. 36 & 37 Vict. c. 66, sec. 21. See also the Public Worship Regulation Act, 1874, 37 & 38 Vict. c. 85. [It does not seem clear what place, if any, is reserved under this scheme for the Court of the Archbishop of Canterbury, recently revived in the case of *Read* v. *Bishop of Lincoln*, still pending, or whether appeal therefrom would lie to the Upper House of the Convocation of Canterbury, or to the Court of Appeal created by the Judicature Act, 1873, or, possibly, to the Queen in Council, *i.e.*, to the Judicial Committee of the Privy Council. The result must, in any of the conceivable hypotheses, it would seem, be something rather novel in the way of appeals, and not very unlike an appeal from the Archbishop of Canterbury in his sole person, to the same as a member or assessor of the Court of Appeal. Cf. *post*, *App.*—ED.]

and should receive the profits spiritual and temporal belonging to his bishopric.[1]

Payment of Peter-pence and other Papal exactions forbidden.

(3) This statute was immediately succeeded by another lopping off a multitude of petty payments which the Pope had been wont to exact. It is declared to be founded on the petition of the Commons complaining to the King that his subjects were greatly decayed and impoverished by the intolerable exactions of the Bishop and See of Rome, the specialities whereof were over long, large in number, and tedious to be particularly inserted; wherein the Bishop of Rome was not only to be blamed for his usurpation of the revenues, but for his abusing and beguiling the King's subjects,—'pretendyng and perswadyng to theym that he hath full power to dispence with all humayne lawes uses and customes of all realmes in all causes which be called spirituall, . . . in great derogacion of your imperiall crowne and auctorytie royall. . . . where this your Graces realme, recognysing noo superior under God but only your Grace, hath byn and ys free frome subjeccion to any mannes lawes but only to such as have bene . . . made . . . within this realme for the welthe of the same, or to suche other as by sufferance of your Grace and your progenytours the people of this your realme have taken at theire free libertie by theire owne consente to be used amonges theym, and have bounde theym selfes by longe use and custome to the observance of the same, not as to the observaunce of the lawes of any foren prynce potentate or prelate, but as to the accustomed and auncient lawes of this realme orygynally established as lawes of the same by the seid sufferance consentes and custome and none otherwyse.' It was therefore enacted that Peter-pence and every other kind of payment made to the Bishop of Rome, and 'to hys chambres which he calleth Apostolyke,' and every species of licence, dispensation and grant, accustomed to be obtained at Rome, should cease; that thereafter all such licences, faculties and other writings might be granted by the Archbishop

[1] 25 Hen. VIII. c. 20, 'An Act restraining the payment of Annates, &c.'

of Canterbury; that children born of marriages solemnised by virtue of an archbishop's licence should be legitimate; and that the penalties of *praemunire* should be incurred by any one suing to Rome for any licences, bulls, or instruments forbidden by the Act. It was however declared that the King, his nobles and subjects, did not intend by this Act to decline or vary from the congregation of Christ's church in any things concerning the very articles of the Catholic Faith of Christendom, or in any other things declared by Holy Scripture and the Word of God necessary for salvation. In order, doubtless, to leave open a possibility of arrangement with the Pope, it was provided that this Act should not take effect till the next feast of St. John the Baptist (24th June, 1534), unless the King before that Feast should declare his will that it should take effect earlier, and at all times before the said Feast he was empowered to annul the whole or any part of the Act at his pleasure.[1]

Henry's first Royal Succession Act.

(4) The first of Henry's statutes for the settlement of the Royal Succession was also passed in this session. Its principal enactments were: an adjudication by authority of Parliament of the nullity of the King's marriage with Queen Catherine and of the validity of that with Anne Boleyn; a declaration of fourteen prohibited degrees of marriage, the tenth on the list being the marriage of a brother with a brother's widow; an entail of the crown;[2] certain new treasons and misprisions of treason; and an oath to observe and maintain the Act, to be taken by all subjects of full age under the penalty, on refusal, of being adjudged guilty of misprision of treason. The terms of the oath prescribed in the Act were, that the deponents would 'truly, firmly and constantly, without fraud or guile, observe, fulfil, maintain, defend and keep, to their cunning,

Oaths imposed by the Act.

[1] 25 Hen. VIII. c. 21, 'An Act for the exoneration from exactions paid to the See of Rome.' [Rev. Stat. i. 423 *seq.*—ED.]

[2] *Supra*, p. 225. [Cf. Bailey's *Succession to the English Crown*, where the history and validity of the various settlements made by Henry VIII. are carefully discussed.—ED.]

wit, and uttermost of their powers, the whole effects and contents of this present Act.'[1] But the oath actually tendered to be taken differed very materially from that required by the statute.

Professedly drawn up in the sense of the statute, this oath was devised so as to include a virtual acknowledgment of the King's Ecclesiastical supremacy, before that supremacy had been established by the Legislature. In its amplified form, it included an abjuration of all faith, truth and obedience to any 'foreign authority, prince or potentate;' a declaration that the deponent reputed 'as vain and annihilate' any oath already made or to be made to any person or persons other than the King and the heirs of his body; and a promise not only to observe the late Act, but also 'all other Acts and Statutes made since the beginning of this present Parliament in confirmation or for due execution of the same.' Sir Thomas More and Bishop Fisher, when called upon to take this amplified oath, which had no Legislative authority, refused, and were in consequence illegally committed to prison, where they remained a long time without trial. In the next session of Parliament the legal difficulty was surmounted by a special Act, by which, after reciting the oath prescribed in the Succession Act; the oath *devised* (but not by Parliament) for the maintenance and defence of the said Act; and setting forth the *tenor* of such devised oath, but with further verbal alterations, it was enacted that the said last mentioned *tenor* oath should 'be interpreted, expounded, reported, accepted and adjudged the very oath that the King's Highness, the Lords spiritual and temporal, and the Commons of this present Parliament meant and intended that every subject of this realm should be bound to take and accept.'[2] For refusing to take this substituted oath, More and Fisher—who were willing to swear to maintain the succession as settled by Parliament, but had scruples as to

Sir Thomas More and Bishop Fisher.

[1] 25 Hen. VIII. c. 22.
[2] 26 Hen. VIII. c. 2.

the preamble of the oath denying the Pope's right of dispensation—were shortly after, while close prisoners in the Tower, and without being heard in their defence, attainted by Acts of Parliament of misprision of treason, and executed.[1]

Session VI. 1534.

Royal Proclamation against the Pope, 9 June, 1534.

Shortly after the close of the preceding session, the news arrived in England of the Pope's adjudication annulling Cranmer's sentence of divorce. This was followed by a Royal Proclamation ordering 'all manner of prayers, oracions, rubrics, canons, or mass-books, and all other books in churches, wherein the Bishop of Rome is named, or his presumptuous and proud pomp and authority preferred, utterly to be abolished, eradicate and rased out, and his name and memory to be never more (except in his contumely and reproach) remembered, but perpetually suppressed and obscured.'[2] Parliament met after the prorogation, on the 3rd November, 1534, and sat till the 18th of the following month. (1) Its first Act was the famous Act of Supremacy. The King had already been recognised by Convocation—under the terror of the *Praemunire*—'*quantum per Christi legem licet Supremum Caput.*' It was now enacted (without the saving clause) that the King should be taken and reputed 'the only Supreme Head on earth of the Church of England called *Ecclesia Anglicana*, and shall have and enjoy, annexed and united to the imperial Crown of this realm, as well the title and style thereof, as all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities, to the said dignity of Supreme Head of the same church belonging and appertaining;' with full power to visit, reform, and correct all heresies, errors, abuses, offences, contempts and enormities which, by any manner of spiritual

Act of Supremacy. [1534.]

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[1] See Amos, 'Statutes of the Reformation Parliament,' pp. 31–36, 46–52.

[2] [The force of Royal Proclamations in this reign, as Dixon remarks, *Hist. Ch. of England*, ii. p. 482, was somewhat diminished, no doubt, by their frequency and violence, as well as by the constant antinomies which they presented.—ED.]

authority or jurisdiction, ought to be reformed or corrected.[1] (2) The second Act of this session was that to which reference has already been made, as having been passed to justify retrospectively the imprisonment of Sir Thomas More and Bishop Fisher, for not taking an oath, which it was now declared[2] had been meant by the Legislature to be taken, although it had in fact prescribed a different oath. (3) By another Act the first-fruits and tenths of the annual income of all ecclesiastical benefices,—the payment of which to the Pope had been stigmatised, in the third session of this Parliament, as having arisen by an uncharitable custom against all equity and justice, and as being exacted only for lucre against all rights and conscience—were 'united and knit to the King's imperial crown for ever.'[3]

Oath to maintain the Succession.

First-fruits annexed to the crown.

The destruction of the Papal power, emoluments, and influence in England, and the reduction of the national English Church under due subordination to the State had now been accomplished. In its seventh and last session the Reformation Parliament commenced the 'second grand innovation in the ecclesiastical polity of England,'—the dissolution of the monasteries. All religious houses under the yearly value of 200*l.* were, to the number of 376, suppressed by Act of Parliament, and all their property, real and personal, given to the King, his heirs and assigns, 'to do and use therewith his or their own wills to the pleasure

Session VII. and last. 1535–6.

Dissolution of the smaller monasteries.

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[1] 26 Hen. VIII. c. 1, endorsed on the original 'The King's Grace to be authorised Supreme Head.' [Dixon argues (*Hist. Ch. of England*, ii. p. 182) that 'no new authority accrued' in England or Ireland from this title, but that it was simply 'declaratory.' It was acknowledged by the Lincolnshire insurgents, and denied, as regards *Cura animarum*, by the Yorkshire insurgents. But it was open to grave misconception, and appears to have been misunderstood on different sides, by Cardinal Pole, and by the Religious Houses themselves, so far as they may be credited with the authorship of the language of their surrenders, which, however, may probably be credited rather to Henry's Commissioners. See extract from Surrender of St. Andrew's, Northampton, *ap.* Dixon, *op. cit.* ii. p. 19.—Ed.]

[2] 26 Hen. VIII. c. 2.

[3] 26 Hen. VIII. c. 3. In the following session of Parliament, 'for the entire and hearty love that his grace bore to the prelates and other incumbents,' they were excused from the tenths in the same year that they paid their first-fruits. 27 Hen. VIII. c. 8.

of Almighty God and the honour and profit of the realm.'[1] To prepare the way for this measure, Thomas Cromwell, the King's chief minister and adviser since the death of Wolsey, had been appointed lord vicegerent of the King in all matters ecclesiastical, and at his suggestion, Commissioners were nominated to make a general visitation of the monasteries. The nature of their Report—which formed the basis of the subsequent legislation—is accurately described in the preamble of the Act. 'Manifest sin,' it is recited, 'vicious, carnal, and abominable luxury, is daily used and committed in such little and small abbeys, priories and other religious houses of monks, canons, and nuns. Amendment has been long tried, but their vicious living shamelessly increaseth and augmenteth.'[2] It scarcely admits of doubt that the Commissioners conducted their investigations with unwarrantable harshness, and that their Report is in particular cases exaggerated. It is a suspicious circumstance that all the smaller monasteries—whose suppression was alone immediately contemplated—are described as vicious, while those whose incomes rose above the hard and fast lines of 200*l.* a year are not only not blamed but even praised. It looks very much as if the small and remote houses, having no one to speak in their favour, were condemned, while the larger, whose abbots could refute unfounded accusations by personal testimony from their seats in Parliament, were conveniently spared till a more favourable opportunity. Yet there is no reason to doubt the substantial and general truth of the allegations of the Commissioners. As religious houses were in general 'exempted from episcopal visitation, and entrusted with

[1] 27 Hen. VIII. c. 28.

[2] [It is difficult to resist feeling the general improbability of such a sharp line of demarcation between the great houses, which had some one to speak for them, and the lesser houses, which were without powerful friends. Moreover, as Canon Dixon shows, *Hist. Ch. of Eng.* i. 362, while the Act which gave the smaller monasteries to the King condemned them as the 'abodes of manifest sin,' the visitors had censured some of the greater houses, while some of the small ones bore a good report. The distinction drawn in the Act is probably well described by Dixon as 'arbitrary,' and as arising from an imitation of the former suppression by Wolsey —ED.]

the care of their own discipline, such abuses had gradually prevailed and gained strength by connivance, as we may naturally expect in corporate bodies of men leading almost of necessity useless and indolent lives, and in whom very indistinct views of moral obligations were combined with a great facility of violating them.' And it is always to be remembered that the vices to which the Report bears witness 'are not only probable from the nature of such foundations, but are imputed to them by the most respectable writers of preceding ages.'[1] Archbishop Morton, under Henry VII., had obtained a Bull from the Pope for the reform of the English monasteries, in which many of them were charged with dissoluteness of life; and the Abbot of St. Alban's was severely reprimanded by the same Archbishop for the alleged scandalous vices of himself and his monks. In 1523, Cardinal Wolsey, as Papal Legate, commenced a visitation of the professed as well as secular clergy, in consequence of the general complaint against their manners. He also set the example of diverting the revenues of these institutions to more useful purposes, by procuring from Rome the suppression of many convents in order to endow a new college at Oxford, which, after his fall, was more completely established under the name of Christ Church.[2] Henry VIII. may have been chiefly actuated by greed of gain and by hatred to the Monastic orders, who as the special protégés of the Papacy were the most obstinate opponents of his Ecclesiastical policy. Their wide-spread influence over the mass of the people rendered them dangerous enemies to a ruler of whose conduct they disapproved. This is evidenced by the insurrections in Lincolnshire and Somersetshire, and the great Northern rebellion, styled by the insurgents the 'Pilgrimage of Grace,' which broke out on the suppression of the smaller monasteries, and was imputed to the 'solicitation and traitorous conspiracy of the monks and canons.'

The 'Pilgrimage of Grace.' 1536–7.

[1] Hallam, Const. Hist. i. 70, 71.
[2] *Ibid.*

The larger monasteries dissolved. 1540.

The rebellion having been ruthlessly stamped out,[1] Henry ventured, four years later, to dissolve the larger monasteries also, without encountering any open resistance from a terrified people. A few had already been held, contrary to every principle of the Common Law, to be forfeited to the Crown by the attainder of their abbots for high treason. The rest were all surrendered, practically under duress. It only remained for Parliament to ratify the King's title under the surrenders and forfeitures, in order to obviate any objection on the score that as all the members of a foundation possessed only life-interests in the property, they could not, either singly or collectively, confer anything more on the sovereign. An Act was accordingly passed, which, after hypocritically reciting that the abbots, priors, abbesses, and prioresses had made surrender, 'of their own free and voluntary minds, goodwills, and assents, without constraint, co-action, or compulsion,' vested in the King and his heirs for ever all the property, real or moveable, of the religious houses 'which had been already or might be hereafter dissolved, suppressed, surrendered, or had or might by any other means come into the hands of the King.'[2]

Was the suppression of the monasteries justifiable?

However harsh and unjust may have been the mode in which, to use a modern phrase, the 'disestablishment and disendowment' of the monasteries was carried out, it was a measure politic in itself, supported by the precedents of

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[1] On the 22nd of February, 1537, after the rebels in the north had dispersed, the King wrote to the Duke of Norfolk: 'Forasmuch as our banner is outspread and displayed, by reason whereof, till the same shall be closed again, the course of our laws must give place to the ordinances and statutes martial, our pleasure is that before you close up our said banner again, you shall, in anywise, *cause such dreadful execution to be done upon a good number of the inhabitants of every town, village and hamlet, that have offended in this rebellion, as well by the hanging of them up in trees, as by the quartering of them, and the setting of their heads and quarters in every town, great and small, and all such other places, as they may be a fearful spectacle to all other hereafter* that would practise any like matter: which we require you to do *without pity or respect*, according to our former letters.' The Duke was also to '*cause all the monks and canons that be in anywise faulty, to be tied up, without further delay or ceremony, to the terrible example of others;* wherein we think you shall do unto us high service.'

[2] 13 Hen. VIII. c. 13.

the Knights Templars under Edward II. and of the Alien Priories under Henry V., and fraught with benefits to the English nation.[1] Hallam has well remarked how in many persons the violence which accompanied this great revolution excites 'so just an indignation, that they either forget to ask whether the end might not have been reached by more laudable means, or condemn that end itself either as sacrilege, or at least as an atrocious violation of the rights of property.' But this is not only to ignore the inherent right of the supreme authority of Parliament to confiscate any property, private or corporate, lay or ecclesiastical, for reasons of which it is itself the sole judge, but also to lose sight of the important distinction between private property and corporate property with respect to the justice and expediency of their confiscation. 'The law of hereditary succession,' continues Hallam, 'as ancient and universal as that of property itself, the law of testamentary disposition, the complement of the former, so long established in most countries as to seem a natural right, have invested the individual possessor of the soil with such a fictitious immortality, such anticipated enjoyment, as it were, of futurity, that his perpetual ownership could not be limited to the term of his own existence, without what he would justly feel as a real deprivation of property. Nor are the expectancies of children, or other probable heirs, less real possessions, which it is a hardship, if not an absolute injury, to defeat. Yet even this hereditary claim is set aside by the laws of forfeiture, which have almost everywhere prevailed. But in estates held, as we call it, in mortmain, there is no intercommunity, no natural privity of interest, between the present possessor and those who may succeed him; and as the former cannot have any pretext for complaint, if, his own rights being preserved, the legislature should alter the course of transmission after

Difference between private and corporate property.

[1] [The precedent of the Templars is scarcely a happy one. But there are, no doubt, certain rather striking analogies in the two cases, both in regard to the property to be obtained through the suppression, and in regard to the value of the confessions extorted from the Templars and from the monks.—Ed.]

his decease, so neither is any hardship sustained by others unless their succession has been already designated or rendered probable. Corporate property, therefore, appears to stand on a very different footing from that of private individuals; and while all infringements of the established privileges of the latter are to be sedulously avoided, and held justifiable only by the strongest motives of public expediency, we cannot but admit the full right of the legislature to new-mould and regulate the former, in all that does not involve existing interests, *upon far slighter reasons of convenience.* If Henry had been content with prohibiting the profession of religious persons for the future, and had gradually diverted their revenues instead of violently confiscating them, no protestant could have found it easy to censure his policy.'[1]

Distribution of the Church property.

The vast wealth which accrued to the Crown by the dissolution of the monasteries, might have rendered the King, had he been able to retain it, independent of the Commons. But he was obliged to bribe all around him, to acquiesce in, and maintain a measure, the accomplishment of which had been attained not without great hazard and difficulty. Some portion was expended on public works and on the foundation of six new Bishoprics, but the greater part was distributed among the nobles and gentry, either as gifts or by sale at low prices. The results of this policy were—(1) the new owners of monastic lands were engaged by the strongest ties of private interest to oppose the re-establishment of the Papal dominion in England; (2) the territorial aristocracy were strengthened by the large infusion of wealth amongst the newly elevated and the more ancient but decayed families; and (3) land was rendered to a much greater extent than formerly, an article of commerce. In connection with this latter result, it is

Its results.

[1] Const. Hist. i. 74, 75; and see Freeman, 'Disestablishment and Disendowment, What are they?' For a Liberal Roman Catholic view, see 'The Home and Foreign Review,' Nos. 7 and 8 (Jan. and Apr., 1864), Arts. 'The Dissolution of the Monasteries' and 'The Rise of the English Poor-law.'

remarkable that the very next year after the passing of the Act for the dissolution of the larger monasteries witnessed the enactment of a goodly array of laws to facilitate the transfer and enjoyment of Real property, a circumstance which can scarcely be regarded as fortuitous.[1]

Doctrines of the Anglican Church declared by Henry.

Henry had now been completely victorious in his contest with the Pope; and the English clergy were so humbled and intimidated that they dared not offer any open resistance to the Royal will. So far as he had advanced on the road of Ecclesiastical Reform, with the single exception of the confiscation of the monasteries, the King had probably been heartily supported by a majority of the nation. But there was a growing minority who were eagerly desirous of essential changes in religious faith. With these Henry had no sympathy. Concurrently with the series of political and legal changes which had been effected in the Ecclesiastical system, severe measures of repression had been taken against the holders of heretical doctrines, and many had from time to time suffered for their opinions. In his new character of Supreme Head of the Church, Henry now determined to vindicate its doctrinal orthodoxy by imposing on his people a compulsory belief in all the leading doctrines of the Roman Church. By the 'Statute of the Six Articles,' as it is commonly called, it was affirmed: 1. That in the

Statute of the *Six Articles.* 1539.

[1] A. Amos, Reformation Parliament, p. 313. Mr. Amos enumerates among the Real Property legislation of this year the statutes—of wills; of limitations; of fines; for conveyance of tithes; for lessees of tenants in tail; for executions upon lands; for partitions; for disseisins; for grantees of reversions; and for buying of titles. Another indirect consequence of the partition of the church lands among the laity, to which Mr. Amos also calls attention, was to promote the extinction of villeinage. Sir Thomas Smith in his 'Commonwealth of England' (b. 3, c. 10.) tells us that the clergy, while impressing upon the laity the duty of manumitting their villeins, 'had a scruple in conscience to impoverish and despoil the church so much as to manumit such as were bound to their churches, or to the manors which the church had gotten,' but 'the monasteries coming into temporal men's hands have been occasion that now they (the villeins) be almost all manumitted.'

[Morgan, *England under the Normans*, p. 233, dealing with the extinction of villeinage, notices the fact that the few villeins remaining in Sir Thomas Smith's time were chiefly upon church lands, and calls this 'a fact rather creditable than otherwise to the ecclesiastical order, considering in what way the tenants of the lay lords had been brought out of bondage.'—ED.]

Eucharist there is really present the natural body of Christ, under the forms, but without the substance, of bread and wine. 2. That communion in both kinds is not necessary to salvation. 3. That priests may not marry by the law of God. 4. That vows of chastity ought to be observed. 5. That private masses ought to be retained in the English Church. 6. That auricular confession is expedient and necessary, and ought to be retained. The penalties for writing, preaching, or disputing against these articles were: Against the first article, death as a heretic, without the option of abjuring. Against the other five, the usual penalties of felony. The Act also declared the marriages of priests or nuns utterly void, ordered any such who were married to be immediately separated, and pronounced their future cohabitation to be felony. Lastly, persons contemptuously refusing to confess at the usual times, or to receive the sacrament, were, for the first offence, to be fined and imprisoned; and for the second, to suffer the punishment of felony.[1] In some other respects Henry was induced by Cromwell and Cranmer to favour Protestant doctrines. An English translation of the Bible was directed to be set up in each parish church for the use of the people;[2] and in the 'Institution' and 'Necessary Doctrine and Erudition of a Christian man,'—books published by Royal authority,—explanations were given which, "if they did not absolutely proscribe most of the ancient opinions, threw at best much doubt upon them, and gave intimations which the people, now become attentive to these questions, were acute enough to interpret."[3]

English translation of the Bible. 1538.

'Institution' and 'Erudition of a Christian man.'

EDWARD VI. 1547–1553. The Religious Reformation under Edw. VI.

The actual Reformation in Religion was established in the early part of the reign of Edward VI., mainly through the instrumentality of Cranmer and the Protector Somerset. The first Act of Edward's first Parliament (which

[1] 31 Hen. VIII. c. 14, 'An Act for Abolishing of Diversity of Opinion in certain Articles concerning Christian Religion.'

[2] In 1543, by an Act 'for the advancement of true religion' (34 Hen. VIII. c. 1) the liberty formerly granted of reading the Bible was abridged.

[3] Hallam, Const. Hist. i. 82.

met on the 4th of Nov. 1547), directed the sacrament of the altar to be administered in both kinds, as being agreeable to primitive usage.[1] In the following year was passed the 'Act for Uniformity of Service and Administration of the Sacraments,' ordaining that the 'order of divine worship,' contained in the Book of Common Prayer which had been drawn up by a committee of bishops and other divines appointed for that purpose, should in future be the only one to be used by all ministers in any cathedral, parish, or other church.[2] In the same session, the marriage of priests was declared lawful;[3] and shortly afterwards images and pictures of saints in churches were ordered to be destroyed.[4] But these changes were not carried out without considerable opposition from a part of the nation. Insurrections of a serious nature broke out in Devonshire, Norfolk, and several other counties; and religious persecution, "the deadly original sin of the reformed churches," was employed as vigorously, if not so extensively, as in the succeeding reigns of Mary and Elizabeth.

Insurrections. 1549.

Persecution.

MARY. 1553–1558. Re-establishment of the Papal religion.

During the short reign of Mary the Papal religion was completely re-established, probably with the entire approval of a large portion, if not of a majority, of the nation, for whom the progress of the Reformation doctrines had been too precipitate. All the laws made against the supremacy of the See of Rome, since the 20th year of Henry VIII., were formally repealed; but it was found impossible to restore the Ecclesiastical property in the hands of subjects;[5] and even the Bill for restoring to the

[1] 1 Edw. VI. c. 1, An Act 'against such as shall irreverently speak against the sacrament of the altar, and the receiving thereof under both kinds.'

[2] 2 & 3 Edw. VI. c. 1. The penalties for refusing to use, or speaking or writing in derogation of, the Book of Common Prayer, were, for the first or second offence, a fine; for the third, forfeiture of goods and imprisonment for life. In 1552, a second Act of Uniformity (5 & 6 Edw. VI. c. 1) was passed, reciting that the Book of Common Prayer had been 'perused, explained, and made fully perfect,' and ordering the new version alone to be used.

[3] 2 & 3 Edw. VI. c. 21.

[4] 3 & 4 Edw. VI. c. 10.

[5] 1 & 2 Phil. & Mary, c. 8, repealing 'all Statutes, Articles, and Provisions made against the See Apostolic of Rome, since the 20th year of King Henry VIII., and for the Establishment of all Spiritual and Ecclesiastical

The Marian Persecution.

The Reformation promoted by it.

Church the first-fruits and impropriations in the Queen's hands was passed not without difficulty. The cruel and wide-spread persecution of the Protestants under Mary, far from eradicating the Reformed faith, was instrumental in promoting it. The abhorrence and disgust excited in the people against Mary and the Roman hierarchy were extended to the doctrines which they professed. 'Many persons,' remarks Hallam, 'are said to have become protestants under Mary, who, at her coming to the throne, had retained the contrary persuasion. And the strongest proof of this may be drawn from the acquiescence of the great body of the people in the re-establishment of protestantism by Elizabeth, when compared with the seditions and discontent on that account under Edward.'[1]

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possessions and hereditaments conveyed to the Laity.' The preamble recites that 'much false and erroneous doctrine hath been taught, preached and written, partly by divers the natural-born subjects of this realm, and partly being brought hither from sundry other foreign countries, had been sown and spread abroad within the same.'

[1] Const. Hist. i. 107.

[On the Reformation Settlement, and its bearing on the question of Establishment and the relations of Church and State in England, reference may be made to the late Prof. Brewer's *Church of England*, ed. by L. T. Dibdin, Barrister-at-Law, Lond. 1885. Much interesting information will also be found in *Narratives of the Reformation*, 1532–56, *Letters on the Suppression of the Monasteries*, the *Diary of Henry Machyn*, and in Rev. N. Pocock's *Troubles connected with the Prayer Book of* 1549 (Camden Soc.). On Sir Thomas More's attitude in the Religious questions of the day, cf. *Eng. Hist. Rev.*, 1889, *Art.* by Rev. W. H. Hutton, on *Sir Thomas More's Religious Writings*, where More is represented as a 'humanist,' but one whose 'ideal of humanism' was 'distinctly the product of Christian thought.'—ED.]

CHAPTER XII.

THE TUDOR PERIOD.

REIGN OF ELIZABETH. (1558—1603.)

THE reign of Elizabeth spans a period of very great political and religious ferment throughout Europe. It is the glory of this great Queen that by her courage and wisdom, aided by the able policy of her statesmen, Cecil, Nicholas Bacon, and Walsingham, she safely guided the nation through a sea of troubles, foreign and domestic, and achieved for England a position in the foremost rank of European monarchies. In commercial and naval enterprise, in every branch of material prosperity, the country advanced with sure and rapid strides, while Literature was adorned by the writings of Shakespeare, Spenser, Sidney, Hooker, and Jewel. But of Constitutional progress, during the greater part of Elizabeth's reign there is little to be recorded. From her father she had inherited the arbitrary Tudor notions of the Royal prerogative. Her government was eminently despotic both in Church and State; and it was only at intervals that the gradually reviving spirit of liberty manifested itself in the House of Commons.

Ecclesiastical polity of Elizabeth.

A brief consideration of the principal features of Elizabeth's Ecclesiastical polity—so important in its influence on later English Constitutional history—will appropriately precede a discussion of the Civil government during her reign.

The first care of Elizabeth's first Parliament—which met on the 25th of January, 1559, about two months

after her accession to the throne—was to restore the constitution and liturgy of the National Church to nearly the same state in which Edward VI. had left them at his death. This was effected by the statutes commonly known as the Acts of Supremacy and Uniformity. By the Act of Supremacy, the statute of Philip and Mary (1 & 2 Phil. & Mar. c. 8), which had generally repealed all the previous statutes affecting religion, was abrogated,—thus reviving the laws of King Henry VIII., which established the Ecclesiastical supremacy of the Crown.

Act of Supremacy. 1559.

It was also particularly enacted: (1) That no foreign prince, person, prelate, state, or potentate, spiritual or temporal, shall use, enjoy or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence, or privilege, spiritual or ecclesiastical, within this realm, or the dominions thereof. (2) That such jurisdictions, privileges, superiorities, pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been, or may lawfully be, exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, contempts and enormities, shall for ever be united and annexed to the imperial crown of this realm. (3) All beneficed ecclesiastics, and all judges, justices, mayors, and other laymen holding office under the Crown, were required to take the oath of supremacy and allegiance,[1] on pain of forfeiting their benefices or offices. (4) Any person maintaining

Oath of supremacy and allegiance.

[1] This oath, which remained unaltered till the Revolution, was thus worded: 'I, A. B., do utterly testify and declare that the Queen's highness is the only supreme governor of this realm, and all other her highness's dominions and countries, as well as in all spiritual and ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm; and therefore I do utterly renounce and forsake all foreign jurisdictions, powers, superiorities and authorities, and do promise that from henceforth I shall bear faith and true allegiance to the Queen's highness, her heirs and lawful successors, and to my power shall assist and defend all jurisdictions, pre-eminence, privileges, and authorities, granted or belonging to the Queen's highness, her heirs and successors, or united and annexed to the imperial crown of this realm.'

the spiritual or temporal jurisdiction of any foreign prince or prelate should, for the first offence, forfeit all his property real and personal; for the second, incur the penalties of *praemunire;* and for the third offence, suffer death as a traitor. (5) The Queen was also empowered to execute the Ecclesiastical jurisdiction of every kind vested in her by the Act by means of Commissioners appointed under the Great Seal for such time as she should direct.[1] It was by virtue of this last provision that Elizabeth established, in 1583, the famous High Commission Court, which continued a powerful instrument of oppression in the hands of the Crown until abolished by the Long Parliament under Charles I.

[Court of High Commission, 1583.]

By the Act of Uniformity, (1) the revised Book of Common Prayer as established by Edward VI. in 1552, was, with a few alterations and additions, revived and confirmed. (2) Any parson, vicar, or other minister, whether beneficed or not, wilfully using any but the established liturgy was to suffer, for the first offence, six months' imprisonment, and if beneficed, forfeit the profits of his benefice for a year; for the second offence, a year's imprisonment; for the third, imprisonment for life. (3) All persons absenting themselves, without lawful or reasonable excuse, from the service at their parish church on Sundays and holydays, were to be punished by ecclesiastical censures and a fine of one shilling for the use of the poor.[2]

Act of Uniformity. 1559.

By another Act of the same session, first-fruits and tenths, which the preamble states the late Queen had given up, 'upon certain zealous and inconvenient respects,' were again vested in the Crown, in order to lessen 'the huge, immeasurable and inestimable charges of the royal

First-fruits and tenths restored to the Crown

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[1] Eliz. c. 1, 'An Act to restore to the Crown the ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same.'

[2] 1 Eliz. c. 2, 'An Act for the Uniformity of Common Prayer in the Church, and Administration of the Sacraments.'

estate.'[1] Such religious houses as Queen Mary had re-founded were suppressed, and their property also given to the Crown.[2]

The Thirty-nine Articles of Religion.

In 1563 the Articles of the English Church, forty-two in number, originally drawn up in 1551 under Edward VI., were revised in Convocation, and reduced to their present number, thirty-nine; but it was not until 1571 that they were made binding upon the clergy by Act of Parliament.[3]

These changes in religion were not effected without considerable opposition in the House of Lords, nine temporal Peers and all the Bishops having protested against the Bill of Uniformity establishing the Anglican liturgy: the Commons, on the contrary, far from offering any opposition, were throughout Elizabeth's reign anxious for further reforms.

Peculiar character of the Reformed National Church.

The formularies of the National Church thus finally established, appear to have been designedly framed in a comprehensive spirit, so as to avoid giving offence to the moderate men of both the religious parties in the state. With reference to this peculiar character of the Reformed National Church as a compromise between the extreme parties of the old and new Theology, Lord Macaulay has remarked: 'She occupies a middle position between the churches of Rome and Geneva. Her doctrinal confessions and discourses, composed by Protestants, set forth principles of theology in which Calvin or Knox would have found scarcely a word to disapprove. Her prayers and thanksgivings, derived from the ancient breviaries, are very generally such that Cardinal Fisher or Cardinal Pole might have heartily joined in them. . . . Nothing, however, so strongly distinguished the Church of England from other churches as the relation in which she stood to the monarchy. The King was her head. The limits of the authority which he possessed, as such, were not traced, and indeed have never yet been traced, with precision. . . . What

Relation in which the Church stood to the Crown.

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[1] 1 Eliz. c. 4. [2] 1 Eliz. c. 24. [3] 13 Eliz. c. 12.

Henry and his favourite counsellors meant, at one time, by the supremacy, was certainly nothing less than the whole power of the keys. The King was to be the Pope of his Kingdom, the Vicar of God, the expositor of Catholic verity, the channel of sacramental graces. He arrogated to himself the right of deciding dogmatically what was orthodox doctrine and what was heresy, of drawing up and imposing confessions of faith, and of giving religious instruction to his people. He proclaimed that all jurisdiction, spiritual as well as temporal, was derived from him alone, and that it was in his power to confer episcopal authority, and to take it away. . . . According to this system, as expounded by Cranmer, the King was the spiritual as well as the temporal chief of the nation. In both capacities his highness must have lieutenants. As he appointed civil officers to keep his seal, to collect his revenues, and to dispense justice in his name, so he appointed divines of various ranks to preach the gospel, and to administer the sacraments. These opinions the archbishop, in spite of the opposition of less courtly divines, followed out to every legitimate consequence. He held that his own spiritual functions, like the secular functions of the chancellor and treasurer, were at once determined by a demise of the crown. When Henry died, therefore, the primate and his suffragans took out fresh commissions, empowering them to ordain and govern the church till the new sovereign should think fit to order otherwise. . . . These high pretensions gave scandal to Protestants as well as to Catholics;' and Elizabeth 'found it necessary expressly to disclaim that sacerdotal character which her father had assumed, and which, according to Cranmer, had been inseparably joined, by divine ordinance, to the regal function.[1]. . . . The Queen, however, still had over the church a visita-

[1] The 37th Article of religion, framed under Elizabeth, declares in emphatic terms, that the ministering of God's Word does not belong to princes. The title of 'Head of the Church,' after being used by Henry VIII., Edward VI., and for a short time by Mary also, was given up by the [last of these] sovereigns, and has not since been assumed by the Crown.

torial power of vast and undefined extent. By the royal authority alone, the prelates of the Church of England were appointed. By the royal authority alone her Convocations were summoned, regulated, prorogued and dissolved. Without the royal sanction her canons had no force. One of the articles of her faith was that without the royal consent no ecclesiastical council could lawfully assemble. From all her judicatures an appeal lay, in the last resort, to the sovereign, even when the question was whether an opinion ought to be accounted heretical, or whether the administration of a sacrament had been valid. Nor did the Church grudge this extensive power to our princes. . . . All her traditions, all her tastes were monarchical. Loyalty became a point of professional honour among her clergy, the peculiar badge which distinguished them at once from Calvinists and from Papists. Both the Calvinists and the Papists, widely as they differed in other respects, regarded with extreme jealousy all encroachments of the temporal power on the domain of the spiritual power. Both Calvinists and Papists maintained that subjects might justifiably draw the sword against ungodly rulers. In France, Calvinists resisted Charles IX.; Papists resisted Henry IV.; both Papists and Calvinists resisted Henry III. In Scotland, Calvinists led Mary captive. On the north of the Trent, Papists took arms against the English throne. The Church of England meantime condemned both Calvinists and Papists, and loudly boasted that no duty was more constantly or earnestly inculcated by her than that of submission to princes.'[1]

Oath of supremacy refused by all the Bishops except one. But the clergy

When the oath of Supremacy was tendered to the Bishops, one only, Kitchin of Llandaff, was prevailed upon to take it; the rest, on refusal, were deprived of their sees.[2] But the general body of the beneficed clergy, with

[1] Macaulay, Hist. Eng. i. [52–58].

[2] It happened that ten sees were vacant at Elizabeth's accession, and fifteen more were vacated by the Bishops who refused the oath of supremacy. Matthew Parker, who had been chaplain to Queen Anne Boleyn, was consecrated Arch-

the exception of a very small number, acquiesced in the new order of things and retained their livings.[1] generally conform.

Throughout her reign it was the constant policy of Elizabeth to maintain her Ecclesiastical supremacy, and to enforce outward conformity with the religion established by law.[2] This policy, which is expressed in a series of persecuting and disabling Acts against Roman Catholics and Protestant sectaries, continued as a marked feature of our system of government for more than two centuries. The Church and the Throne mutually supported each other against the advocates of Civil and Religious freedom, and to the heat of political contests was added the bitterness of theological hatred. Persecuting statutes.

The first attack upon the Romanists was made by a statute passed in 1562, 'for the assurance of the Queen's royal power over all estates and subjects within her dominions.' The preamble recites the 'perils, dishonours, and inconveniences that have resulted from the usurped power of the see of Rome, and the danger from the fautors of that usurped power, at this time grown to marvellous outrage and licentious boldness, and now requiring more sharp restraint and correction of laws than hitherto in the time of the Queen's most mild and merciful reign, Act of 1562.

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bishop of Canterbury, December 17, 1559, and before the end of 1562, all the sees, except Oxford, were filled up by men eminent for their zeal in the Protestant cause, many of whom had been exiles during the Marian persecution.

[1] Out of a body of nearly 10,000 only about 100 dignitaries, and 80 parochial priests, resigned their benefices or were deprived. Strype's Annals, 169, cited by Hallam.

[2] Elizabeth's own words were: 'She would suppress the papistical religion, that it should not grow; but would root out puritanism, and the favourers thereof.' 'No man should be suffered to decline, either to the right or left hand, from the drawn line limited by authority.' Strype, Life of Whitgift, and Eccles. Annals, iv. 242. [Elizabeth's line is thus described by S. R. Gardiner, LL.D., *Hist. Eng.*, 1603–42, vol. i. p. 12. 'Opinion was to be practically free, but all must go to church, and the exercise of the Roman Catholic worship was rigidly suppressed.' Gardiner thinks that Elizabeth 'took no interest in theological reasoning,' and 'miscalculated the power which it still exercised in the world.' The alleged want of interest seems difficult to believe of one brought up in an atmosphere so full of Theological controversy, in which she necessarily took a side. That Elizabeth may have miscalculated the interest which it had for the world of her day is possible, but even that seems scarcely probable.—ED.]

hath been had, used, and established.' It was therefore enacted: (1) That the penalties of *praemunire* should be incurred by all who maintained the authority of the Pope within the realm. (2) That the Bishops and Commissioners to be appointed under the Great Seal should have power to tender the oath of supremacy to, and that the same should be taken by, all persons who had ever been admitted into holy orders or to any degree in the Universities; all schoolmasters and public and private teachers of children; and all barristers, attorneys, officers of the Inns of Court, and other persons engaged in the execution of the law. The penalty for the first refusal of this oath was that of *praemunire*, but if, after three months, there was a second tender and refusal, the offence was made high treason. (3) Every member of the House of Commons was to take the oath before entering upon his Parliamentary functions; but it was not to be tendered to the temporal Peers, in whom, although many of them were still Roman Catholics, the Queen declared her full confidence.[1]

Speech of Lord Montagu.

This severe statute excited some opposition in both Houses of Parliament. In the Upper House, Lord Montagu delivered a speech against it which is characterised by great liberality and tolerance, virtues which in that age were rarely advocated by any party, except when itself the object of persecution. 'This law,' said Lord Montagu, 'is not necessary; forasmuch as the Catholics of this realm disturb not, nor hinder the public affairs of the realm, neither spiritual nor temporal. They dispute not, they preach not, they disobey not the Queen; they cause no trouble nor tumults among the people; so that no man can say that thereby the realm doth receive any hurt or damage by them. They have brought into the realm no novelties in doctrine and religion. This being true and evident, as it is indeed, there is no necessity why any new law should be made against them. . . . I do entreat,' he continued, 'whether it be just to make this penal statute to

[1] 5 Eliz. c. i.

force the subjects of this realm to receive and believe the religion of Protestants on pain of death. This I say to be a thing most unjust; for that it is repugnant to the natural liberty of men's understanding. For understanding may be persuaded but not forced.' He concluded by pointing out the danger of driving the Catholics to forcible resistance: 'It is an easy thing to understand that a thing so unjust, and so contrary to all reason and liberty of man, cannot be put in execution but with great incommodity and difficulty. . . . To be still or dissemble may be borne and suffered for a time—to keep his reckoning with God alone; but to be compelled to lie and to swear, or else to die therefor, are things that no man ought to suffer and endure. And it is to be feared, rather than to die, they will seek how to defend themselves; whereby should ensue the contrary of what every good prince and well-advised commonwealth ought to seek and pretend, that is, to keep their kingdom and government in peace.'[1] This reasoning seems to have produced some effect on the Government, although it did not prevent the passing of the statute. Archbishop Parker privately instructed the Bishops to use great caution in tendering the oath of supremacy under the Act, and never to do so the second time, on which the penalty of treason might attach, without his previous authorisation. Some time afterwards, however, Horne, Bishop of Winchester, indiscreetly giving vent to his indignation against Bonner, the deprived Bishop of London, who was specially obnoxious on account of the prominent part taken by him in the Marian persecution, indicted him for refusing to take the oath of supremacy. On his trial, Bonner pleaded that Horne was not a lawful bishop, and therefore had no authority to tender the oath. The prosecution was now dropped; Bonner was suffered to return to his prison in the Marshalsea, where he had been confined since the accession of the Queen; and as soon as Parliament was

The Bishops' Act, 1566.

[1] Strype, cited in Hallam, Const. Hist. i. 116.

re-assembled, an Act was passed declaring the consecration of the Archbishops and Bishops, as practised since the Queen's accession, 'good, lawful, and perfect.'[1]

The Roman Catholics suspected of disloyalty.

Eight years elapsed before further legislation was directed against the Roman Catholics; but in the meantime several circumstances had occurred, which rendered them specially obnoxious to the Government, not merely as being opponents of the established religion, but as tainted with disloyalty to the Queen. At first the Catholics generally had attended church, and yielded an apparent conformity to the English service; but in 1563, the Council of Trent, in its last session, pronounced a condemnation of such outward conformity. This censure was industriously circulated throughout England by William Allen[2] and other priests, who now ventured to return from the voluntary banishment into which they had gone on the death of Queen Mary. The Romanists, in consequence, began to decline attendance at Church; and many withdrew abroad, where they formed centres of disaffection, in which plots were constantly being hatched against Queen Elizabeth.

Elizabeth's title to the throne purely Parliamentary.

The relations of Elizabeth towards her Roman Catholic subjects were also materially affected by the special character of her title to the throne, and the uncertainty in which the succession was involved,—an uncertainty which was increased by her repeated refusals to marry, or to agree to a Parliamentary appointment of a successor. The Queen's title to the throne depended absolutely on an Act of Par-

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[1] 8 Eliz. c. 1. The only [Legal] irregularity in the consecration of the bishops had consisted in the use of the ordinal of Edward VI. before it had been legally re-established. As the Pre-Reformation [Sarum] ordinal had been abolished, and that of Edward VI. was not yet re-established, there existed at the time no form of consecration prescribed by the English law.

[2] Allen had been Principal of St. Mary Hall, Oxford, in Mary's reign, and had gone into exile on the re-establishment of the Reformed Rite. He founded a seminary at Douay, where [Roman] Catholics of the best English families were sent to be educated, and whence a constant succession of priests passed into England, not only to look after the spiritual welfare of the Romanists, but to intrigue against the Government. Allen was made a Cardinal in 1587, wrote an Admonition in favour of the projected Spanish Armada, and was rewarded by Philip II. with the Archbishopric of Mechlin. He died in 1594. Lingard, Hist. Eng. viii. 140, 442.

liament (35 Hen. VIII. c. 1), by which the Crown had been settled upon her. She had also been nominated in the succession, after her sister Mary, by her father's will, and her title had been ratified by the Act passed immediately after her accession (1 Eliz. c. 3). Her right to the Crown was therefore based upon the best of all titles, the will of the people expressed by their representatives in Parliament. But the natural prejudice of most of the Roman Catholics in favour of a monarch of their own religion, coupled with the preference felt by many for a strictly hereditary over a purely Parliamentary title, led them to regard the Queen of Scots, grand-daughter of Henry VIII.'s eldest sister Margaret, as having a prior right to the throne during Elizabeth's life, and in any case as its presumptive heir after her decease. Under the provisions of Henry's will—executed under Parliamentary authority—the succession in remainder was vested in the House of Suffolk to the postponement, if not exclusion, of the Scottish line. But the harsh and unjust condemnation of Lady Catherine Grey's private marriage with the Earl of Hertford, which Elizabeth's jealous humour procured to be pronounced early in her reign, cast a doubt upon the legitimacy of the Protestant line of Suffolk, and thus strengthened the hopes of the [Roman] Catholic adherents of Mary of Scotland. So early as 1563, Edmund and Arthur Pole, nephews of the late Cardinal, were tried and convicted of high treason on a charge of designing to set the Queen of Scots on the throne and to re-establish Romanism in England. In 1567, Mary, having been driven from her throne, in a great measure owing to the intrigues of Elizabeth's Ministers with the Scottish malcontents, escaped into England, only to endure a long imprisonment ending in a violent death. Her presence on English soil revived the hopes of the Romanists. Plots were formed for her liberation, for the invasion of England by Spain, and for the re-establishment of the Roman Rite. In 1569 the Duke of Norfolk, the greatest and richest subject in England, was concerned in an extensive conspiracy, involving the deposition of the

Roman Catholics favour the hereditary claims of Mary Queen of Scots.

Title of the House of Suffolk.

Harsh treatment of Lady Catherine Grey.

Treason of Edmund and Arthur Pole.

Effect of Mary's flight into England.

Rebellion of the Duke of Norfolk;

Queen, his own marriage with Mary of Scotland, and the invasion of the kingdom by the Duke of Alva.[1] Later in the same year the Earls of Northumberland and Westmoreland took up arms in the north, with the design of restoring the old religion; and at the beginning of 1570, Pope Pius V., who had secretly instigated this insurrection, published his celebrated Bull, excommunicating and deposing Elizabeth, and absolving all her subjects from their oaths of fidelity and allegiance.[2]

and of the Earls of Northumberland and Westmoreland, 1569.

Bull of [Excommunication of] Pius V. 1570.

As soon as Parliament met, in April, 1571, two statutes were passed in reply to the Pope's Bull, and as a precaution against fresh attempts on the part of Mary's partisans. By the first of these, (1) It was made high treason to affirm that the Queen was a heretic, schismatic, tyrant, infidel, or usurper of the crown; or that the common law, until altered by Parliament, ought not to bind the right of the Crown, or that the Queen, with the authority of Parliament, was not able to make laws limiting and binding the Crown and the descent, inheritance, and government thereof. (2) And it was further declared to be an offence, punishable by imprisonment and forfeiture of goods, and on repetition by a *praemunire,* for any one during the Queen's life, and before the same had been established by Parliament, to affirm, print, or write that any one particular person was or ought to be heir or successor of the Queen, except the natural issue of her body.[3] The second Act refers specially to the

Acts of 1571.

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[1] He was convicted of treason and executed in 1572. *Supra*, p. 406.

[2] 'The bull of Pius V.,' observes Hallam (Const. Hist. i. 137), 'far more injurious in its consequences to those it was designed to serve than to Elizabeth, forms a leading epoch in the history of our English catholics. It rested upon a principle never universally acknowledged, and regarded with much jealousy by temporal governments, yet maintained in all countries by many whose zeal and ability rendered them formidable—the right vested in the supreme pontiff to depose kings for heinous crimes against the church. One Felton affixed this bull to the gates of the Bishop of London's palace, and suffered death for the offence. So audacious a manifestation of disloyalty was imputed with little justice to the catholics at large, but might more reasonably lie at the door of those active instruments of Rome, the English refugee priests and Jesuits dispersed over Flanders, and lately established at Douay, who were continually passing into the kingdom, not only to keep alive the precarious faith of the laity, but, as was generally surmised, to excite them against their sovereign.'

[3] 13 Eliz. c. 1. *Supra*, p. 228.

Pope's recent Bull, and recites that by colour thereof wicked persons, in parts of the realm where the people, for want of good instruction, are weak, simple and ignorant, have so far wrought, that sundry simple and ignorant persons have been reconciled to the usurped authority of Rome, and to take absolution, whereby have grown great disobedience and boldness, not only to withdraw from all divine service, but thinking themselves discharged from all allegiance to the Queen, wicked and unnatural rebellion hath ensued.' It was therefore enacted: (1) That any person publishing any Bull from Rome, or absolving and reconciling any one to the Roman Church, or being so reconciled, should incur the penalties of high treason. (2) Aiders and comforters after the fact were to incur *praemunire*; and any person to whom absolution should be offered, and who should not disclose such offer within six weeks to some member of the Privy Council, was to be held guilty of misprision of treason. (3) *Praemunire* was also imposed upon such as brought into the realm 'things called Agnus Dei, or any pictures, crosses, beads, or such-like superstitious things, hallowed and consecrated, as it is termed, by the Bishop of Rome.'[1]

Jesuits and missionary priests in England.

During an interval of ten years no further statute was passed against the Roman Catholics, but the existing laws were enforced by the Government in all their severity. Persecution, however, served only to excite fresh manifestations of zeal. Missionary priests were poured into the kingdom from Douay and Rome; and in 1580, a mission of the recently-founded order of Jesuits, under the leadership of Robert Parsons and Edmund Campion, was despatched by Pope Gregory XIII. to bring about the re-conversion of England. The Government was seriously alarmed. A proclamation was issued denouncing as aiders and abettors of treason all who should harbour or conceal any Jesuit or seminarist in the kingdom, and as soon as Parliament met a severe Act was passed 'to retain the queen's majesty's

Act of 1580-1.

[1] 13 Eliz. c. 2.

subjects in their due obedience.' By this statute: (1) The former provisions making it high treason to reconcile any of her majesty's subjects, or to be reconciled to the Church of Rome, were re-enacted. (2) The celebration of the mass was made punishable with a fine of 200 marks and a year's imprisonment; hearing mass, with a fine of 100 marks and imprisonment for a like period. (3) All persons above sixteen absenting themselves from church, unless they should hear the established service at home, were to forfeit 20*l.* a month, or, in default of payment within three months after judgment, to be imprisoned until they should conform. (4) All schoolmasters were to be licensed by the Ordinary, or suffer a year's imprisonment; and persons employing them unlicensed, were to forfeit 10*l.* a month.[1]

The Jesuit Campion.

Shortly afterwards, the Jesuit Campion and several seminary priests from Flanders, after having eluded the vigilance of the government for some time, were seized and imprisoned in the Tower. Under the pain of the rack,[2]

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[1] 23 Eliz. c. 1. By a subsequent Act (26 Eliz. c. 6) the Queen was empowered, for default of payments of the fine, to seize two-thirds of the land and all the goods of the delinquents.

Torture.

[2] 'The common law of England . . . neither admits of torture to extort confession, nor of any penal infliction not warranted by a judicial sentence. But this law, though still sacred in the courts of justice, was set aside by the Privy Council under the Tudor line.' Hallam, Const. Hist. i. 148. Though unknown to the Common Law, torture seems to have been occasionally employed, by special licence from the Crown. Some early instances of its use are given in Mr. L. O. Pike's History of Crime, vol. i. For a description of the different kinds of torture, see Lingard, viii. 428, note (G.). Sir Edward Coke (3 Inst. p. 35) says the rack in the Tower was introduced by the Duke of Exeter under Henry VI. whence it obtained the name of 'the Duke of Exeter's daughter.' He adds 'there is no law to warrant tortures in this land, nor can they be justified by any prescription being so lately brought in.' Under James I. the torture was employed in the case of the Gunpowder Plot conspirators, and on other occasions; but on the trial of Felton (*t.* Car. I.) for the assassination of the Duke of Buckingham, when it was proposed in the Privy Council to put the accused on the rack in order to discover his accomplices, the Judges (being consulted) declared unanimously that no such proceeding was allowable by the law. They equally refused, as being *ultra vires*, to add some additional punishment, at the King's request, to that which the law had ordained for murder. 3 St. Tr., 367, 571. Mr. Jardine, in his 'Reading on the use of Torture,' says 'the last case of torture in England, of which I can find any trace, occurred in the year 1640.' [On Torture under Roman Law, see *Law Magazine and Review*, No. CCLXXIV., for Nov., 1889, Art. *The State and Private Life in Roman Law*, by James Williams, B.C.L., and cf. Art. by same in *Encyc. Brit.*, 9th ed., *s.v.* Torture, or the subject generally. Gardiner, *Hist. Eng.*, 1603-1642, i. 265, basing

Campion revealed the names of several [Roman] Catholics who had sheltered him, and who were fined and imprisoned for the offence. Failing to give satisfactory answers as to the Pope's deposing power, he was tried and condemned for high treason, and executed with two other priests.

Executed, 1581, Dec. 1.

Driven to desperation by the severity of the persecution, some of the more reckless spirits among the Roman Catholics now began to form plots for the assassination of the Queen, as a means to the elevation of Mary of Scotland to the throne. In September, 1584, one Creighton, a Scottish Jesuit, was captured at sea, bearing about him the heads of a plan for a Spanish invasion and the deposition or death of the Queen. When Parliament met in November, its first Act was one 'for the security of the Queen's most royal person and the continuance of the realm in peace.' This statute legalised a voluntary association which had been formed shortly before, the members of which had sworn to protect the Queen from assassination or to avenge her death. It also enacted that if any invasion or rebellion should be made by or for any person pretending title to the Crown after the Queen's decease, or if anything be compassed or imagined tending to the hurt of her person, with the privity of any such person, a number of peers, privy councillors, and judges, to be commissioned by the Queen, should examine and give judgment on such offences and all circumstances relating thereto. All persons who should authorise such an attempt, *or on whose behalf the same should be made*, were declared to be incapable of ever inheriting the throne.[1]

Plots against the Queen's life.

Association for the Queen's defence.

It was under the provisions of this statute that Mary,

[Execution of Mary, Queen of Scots, under 27 Eliz. c. 1.]

apparently on Jardine, assumes the use of torture to have been 'considered to be a part of the Royal Prerogative.' This view would seem to be implied in the 'special licence from the Crown' mentioned in the author's note, *supra*. But that there ever existed a special Prerogative to order the employment of Torture may be doubted; it can scarcely have been, as Gardiner seems to take it, part of an assumed general Prerogative to override the Common Law.—ED.]

[1] 27 Eliz. c. 1.

Queen of Scots was tried and found guilty, in 1586, of having been privy to Babington's conspiracy to kill the Queen, and of having herself 'compassed and imagined within this realm of England divers matters tending to the hurt, death, and destruction of the royal person of our sovereign lady the Queen.'[1]

Act against the Jesuits, 1585.

The second Act of the Parliament of 1585 was directed against 'Jesuits, seminary priests, and other such-like disobedient persons.' (1) All Jesuits, seminary and other Roman Catholic priests, whether ordained within or without the kingdom, were commanded to quit the realm within forty days, under the penalty of high treason; to aid or receive them was made felony; and any person knowing a priest to be within the kingdom and not disclosing the fact to a magistrate, was to be fined and imprisoned at the Queen's pleasure. (2) All students in the Romanist seminaries who should not return within six months after proclamation to that effect, and within two days afterwards take the oath of supremacy, should be punished as traitors; persons sending children abroad without licence were to forfeit 100*l.* for each offence, and to incur a *praemunire* if they sent money to any already at a seminary: the children so sent were disabled from inheriting any property from the sender.[2]

Execution of Mary, Queen of Scots, 1587.

Spanish Armada, 1588.

So drastic a law as this would seem to have rendered any further penal legislation against the Roman Catholics unnecessary. The execution of Mary of Scotland on the 8th of Feb. 1587 relieved the Queen from the only dangerous pretender to the throne, and deprived the [Roman] Catholics of their last hope. The patriotism and loyalty displayed by them during the agonising crisis of the Armada would have been fitly acknowledged by some remission of penalties. But far from being relaxed, the persecution became more

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[1] For remarks on the trial and execution of Mary of Scotland, arguing that 'if not capable of complete vindication it has at least encountered a disproportioned censure,' see Hallam, Const. Hist. i. 158-162.

[2] 27 Eliz. c. 2.

rigorous;[1] and yet one more statute was passed against 'popish recusants,' as persons convicted for non-attendance at church were now denominated, restraining them to particular places of residence, from which they were not to travel more than five miles; and providing that if they had not goods enough to pay the monthly fine of 20*l.* to which they were subject, they should abjure the realm, or suffer as felons.[2] Act of 1593.

The perils with which the throne of Elizabeth was constantly menaced by the perpetual conspiracy of Rome and Spain against her during the greater part of her reign, and the imputation of disloyalty necessarily attaching to all strict [Roman] Catholics after the promulgation of the Pope's deposing Bull, afforded some justification for the harsh persecution to which they were subjected.

For the simultaneous persecution of the Protestant Nonconformists no such extenuation can be pleaded.[3] 'The Puritans,' as Macaulay has justly remarked, 'even in the depths of the prisons to which Elizabeth had sent them, prayed, and with no simulated fervour, that she might be kept from the dagger of the assassin, that rebellion might be put down under her feet, and that her arms might be victorious by sea and land. One of the most stubborn of the stubborn sect, immediately after his hand had been lopped off for an offence into which he had been hurried Persecution of the Protestant sectaries.

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[1] The Roman Catholic martyrs under Elizabeth have been reckoned at from 191 to 204. Hallam, Const. Hist. i. 163. Of these 110 suffered death between 1588 and 1603. Lingard, viii. 295.

[2] 35 Eliz. c. 2.

[3] [In point of fact, Elizabeth seems practically to have had no alternative action open to her with regard to the Puritan party. Gardiner, *Hist. Eng.* 1603–1642, i. 25–26, argues that 'in taking her stand, as she did, against the abolition of Episcopacy, Elizabeth was on the whole acting on behalf of the liberty of her subjects. . . . They [the Puritan party] asked for no position which was to be held on sufferance; their claim was that their system was directly commanded by the Word of God, and that, without grievous sin, not a moment could be lost in delivering the whole Church of England into their hands.' This is, of course, not an argument in favour of persecution, but it shews that there was no practical possibility of making terms with the extreme Puritan school, and, unfortunately, repressive Legislation was the only means of keeping down differences which threatened to throw England 'into confusion from one end to the other' recognised by either the Crown or the Parliament in Elizabeth's day.—Ed.]

by his intemperate zeal, waved his hat with the hand which was still left him, and shouted, "God save the Queen!"'[1]

The reformed Anglican Church, as professedly 'keeping the mean between the two extremes,' had from the first been distasteful to a large body of the more zealous Protestants, who were eager to discard all rites and ceremonies savouring in any degree of the Roman system of worship. During the Marian persecution many of these men sought refuge in Germany and Switzerland, where they imbibed Calvinistic doctrines, and grew accustomed to a simple form of divine service and a Democratic system of Church government. Returning to England on the accession of Elizabeth, these exiles were dissatisfied at finding that far from proceeding in the path of reform, the Queen and her Ministers were inclined somewhat to recede even from the point which had been attained under Edward VI.[2] Though separated from the Roman Communion, the Anglican reformers had by no means intended to abolish the binding nature of authority in matters of religion, but merely to substitute one kind of authority for another. But the very fact of the separation was in its essence an assertion, however unintentional, of the right of private judgment.

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[1] Hist. Eng. i. [62]. The person referred to was Thomas Stubbe, a lawyer, and brother-in-law of Cartwright the leader of the Puritans. In 1579, the Queen, much to the alarm of her Protestant subjects, entered into negotiations for a marriage with the Duke of Alençon (afterwards Duke of Anjou). Stubbe ventured to remonstrate in a pamphlet entitled the 'Discovery of a Gaping Gulph in which England will be swallowed up by the French Marriage.' For this pamphlet, which, very far from being a virulent libel, is written in a sensible manner and with unfeigned loyalty and affection towards the Queen, he suffered the mutilation mentioned in the text.

[2] The retention of vestments, instrumental music, and other features of the ancient church ceremonial, though thoroughly defensible on the grounds of decency and order, and as tending to conciliate the very large Roman party existing in the kingdom, was due in a large measure to the strong personal predilection of the Queen. She manifested a very decided leaning towards the forms of worship and even to some of the doctrines of the Roman Church, and resolutely opposed the marriage of the clergy. Although the marriage of bishops and priests was connived at, the Queen would never consent to repeal the statute of Mary against it. Until the first year of James I., when this statute was explicitly abrogated, the offspring of clerical marriages were, in the eye of the law, illegitimate. Hallam, Const. Hist. i. 173.

Having emancipated themselves by a great mental effort from the despotism of a church 'strong in immemorial antiquity and catholic consent,'[1] the more ardent Reformers were indignant at the attempt made to bind them anew by the authority of a Church which they considered to be sprung from the exercise of that right of private judgment which it now sought to suppress.

For several years the deviations of many of the clergy from the uniformity prescribed by statute were connived at by the Bishops, several of whom sympathised with the Puritan party. But in 1565 the Queen determined to put a stop to these irregularities. At her instigation Archbishop Parker published a book of 'Advertisements' to the clergy, containing strict regulations for their discipline. Shortly afterwards, Sampson, Dean of Christchurch, and Humphrey, Regius Professor of Divinity and President of Magdalen College, Oxford, two of the most eminent Puritans, were deprived of their preferments; and thirty-seven of the London clergy refusing to comply with the legal ceremonies, were suspended from their ministry and threatened with the punishment of deprivation. Abandoning the churches, the lay Puritans in London now began to form separate conventicles. In June, 1567, a congregation of more than one hundred were seized at Plumbers' Hall, and about thirty of them subjected to a year's imprisonment for their contumacy.[2] This was the first instance of actual punishment inflicted on Protestant dissenters.

Archbishop Parker's Advertisements. 1565.

Puritan conventicles.

Attempt to suppress them, 1567.

Hitherto the Puritans had restricted their opposition to the retention of what they deemed superstitious ceremonies in the Church services; but about the year 1570, attacks began to be made on the Episcopal system of Church government. The principal leader in this new movement was Thomas Cartwright, Lady Margaret Professor of

The Puritans attack Episcopacy.

Cartwright's 'Admonition to the Parliament.'

[1] [It is obvious, of course, that the maintenance of an attitude of separation from Rome was justifiable on the ground that the Roman system had neither 'Antiquity' nor 'Catholicity' really on its side, in the sense of the well-known Canon of Vincent of Lerins.—Ed.]

[2] Lingard, viii. 73.

Divinity at Cambridge, and the reputed author of an 'Admonition to the Parliament,' published in 1572, which demanded, in bold and contemptuous language, a reform of the various abuses alleged to exist in the Established Church. The Puritans had many friends in the House of Commons, in the Queen's Council, and among the Bishops. From time to time Bills were introduced for abolishing various Ecclesiastical rites and ceremonies, and even for abrogating some of the Thirty-nine Articles, but, mainly through the determined opposition of the Queen, they were invariably withdrawn. Archbishop Grindal, who succeeded Parker in February, 1576, was inclined to the views of the Puritans, and for refusing to comply with the command to suppress certain meetings of the more precise clergy for prayer and exposition of scripture, termed 'Prophesyings,' was sequestered from his see for five years, and only escaped deprivation by his death in 1583.

Archbishop Grindal sequestered from his see for declining to suppress the 'Prophesyings.'

Archbishop Whitgift.

Whitgift, his successor in the Primacy, was a strenuous opponent of the Puritans. Under the provision of the Act of Supremacy of 1559, authorising the Queen to execute her Ecclesiastical jurisdiction by Commissioners appointed under the Great Seal, several temporary Commissions had been successively appointed, mainly with a view to the coercion of the Roman Catholics. In Dec. 1583 the High Commission Court was permanently established with such extensive and formidable powers as to render it a very near approach to the Roman Inquisition. Of the forty-four Commissioners who composed this tribunal, twelve were prelates; and three, of whom one must be a Bishop, formed a quorum. They were directed to enquire generally, as well by the oaths of twelve good and lawful men, as by witnesses, and all other means they could devise,[1] of all matters affecting

High Commission Court established, 1583.

[1] [Gardiner, *Hist. Eng.*, 1603–1642, i. 34, 35, has some strong remarks on the varied forms of oppression united in this Court. As to the Inquisition, he notes two points of difference by which 'alone' the Court of High Commission was distinguished: it was 'incompetent to inflict the punishment of death, and it was not permitted to extract confessions by means of physical torture.' With regard to the Jury he says, not without a certain irony, 'It would have been almost impossible to have constituted an English court without assigning

religion, such as heretical and schismatic opinions, absence from church, seditious books, slanderous words and sayings, incests, adulteries, and other immoralities; to examine all suspected persons on their oaths; to tender the oath of Supremacy according to the Act of Parliament, and to punish all who should refuse to appear or to obey their orders, by excommunication, fine and imprisonment.[1] Under these extensive powers, such of the clergy as were suspected of Puritanic tendencies, were summoned to take the famous oath *ex officio.* This was a technical name for a series of Ecclesiastical interrogatories founded on the Canon Law, but utterly opposed to the maxims of the Law of England, and which Lord Burleigh, who strongly disapproved of the proceeding, described as 'so curiously penned, so full of branches and circumstances, as he thought the inquisitors of Spain used not so many questions to comprehend and to trap their preys.'[2]

The oath *ex officio.*

Instead of producing conformity, the rigorous proceedings of the High Commission Court only served to exasperate the sectaries still more against the Hierarchy. Declamatory and scurrilous pamphlets directed against the Bishops, of which the most notable was a series published under the pseudonym of 'Martin Mar-Prelate,' rapidly issued from the press and obtained a wide popularity.

Martin Mar-Prelate pamphlets.

An Act had been passed in 1581, levelled at the writings of the seminary priests, by which it was made a capital felony 'to write, print, or set forth any manner of book, rhyme, ballad, letter or writing, containing any false or seditious matter to the defamation of the Queen's majesty, or the encouraging of insurrection or rebellion within the realm.'[3] By a strained construction of the Judges it was

Puritan 'libellers' punished with death.

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to it the power of arriving at the truth by the ordinary mode, the oaths of twelve good and lawful men. But, homage having been thus done to this time honoured institution, the Commission proceeded to direct that recourse might be had to witnesses alone, and even that conviction might be obtained by all other ways and means which could be devised.' This last 'vague clause,' it was soon seen, meant the oath *ex officio.*—ED.]

[1] Neal, Hist. Puritans, i. 409 *seq.*; Strype, Annals, iii. 180.

[2] Strype's Whitgift, 157.

[3] 23 Eliz. c. 2.

held that the Puritanical 'libels,' as they were termed, tending to subvert the constitution of the Church and the Ecclesiastical supremacy of the Queen, were seditious, and punishable under the Act. Of the most conspicuous victims, Udal, a Puritan minister, was convicted for an alleged libel on the Bishops in 1591, and sentenced to death. The extreme penalty was remitted, on the intercession of Whitgift, but the prisoner soon died from the severity of his confinement. In 1593, Henry Barrow, a lawyer, and John Greenwood, a clergyman, were convicted and executed for writing 'sundry seditious books, tending to the slander of the Queen and State;' and the same year, Henry Penry, a young Welsh clergyman who was strongly suspected of being one of the authors of the Martin Mar-Prelate tracts, was tried for 'seditious words and rumours against the Queen.' Although the only evidence against him consisted of certain unconnected sentences discovered among his private papers, and which had never been communicated to any other person, he was found guilty, and executed with great haste and cruelty.[1]

Udal, 1591.

Barrow and Greenwood, 1593.

Penry, 1593.

The position of Ecclesiastical affairs in Scotland was at once an encouragement to the English Puritans to persevere in their efforts and an incentive to Elizabeth and her councillors to enforce strict uniformity. The Scottish Reformed Church, as established in 1560, though retaining a nominal form of Episcopacy, approached very nearly to the system of Church polity advocated by the Puritans, and in 1592 Episcopacy was abolished altogether.[2] About the same time a serious attempt was made, under the leadership of Cartwright, to set up the Presbyterian system in England. Cartwright and nine of his associates were summoned before the High Commission Court, and, refusing to answer interrogatories under the oath *ex officio*, were

Influence of Scotch Ecclesiastical affairs on England.

Presbyterianism in England, 1591.

[1] Lingard, viii. 304.

[2] [On this see *Church Quarterly Review*, Jan. 1885, Art., *The Seabury Centenary*. On the state of Ecclesiastical affairs in Scotland and its influence upon England, see Gardiner, *Hist. Eng.* 1603–1642, i. ch. ii., Church and State in Scotland.—ED.]

committed to prison. In the Star Chamber—a tribunal possessing more extended powers of punishment—they still persisted in their refusal to incriminate themselves, as being contrary to the Law of the land. Although it was contemplated at one time to send them into perpetual banishment, more moderate counsels prevailed, and they were ultimately liberated on bail, after satisfying the court on the question of the Queen's supremacy.

The favour with which the Puritans were regarded in the Queen's Council, and especially in the House of Commons, had hitherto prevented any special legislation against them. But in 1593, Parliament was induced to pass an Act subjecting Protestant nonconformists to penalties similar to those already imposed upon Popish recusants.[1] All persons above the age of sixteen denying or impugning the Queen's supremacy, or obstinately refusing to come to the church established by law, or attending 'any assemblies, conventicles, or meetings, under colour or pretence of the exercise of religion,' were to be imprisoned until they should openly conform. Failing to conform within three months they were to abjure the realm, and for refusal to do so, or for returning after abjuration without licence, the punishment was, to suffer death as a felon.[2]

Act of 1593 against Protestant Nonconformists.

The persecuting policy adopted by Elizabeth against the Puritans had most important political results. 'It found them a sect; it made them a faction. To their hatred of the Church was now added hatred of the Crown. The two sentiments were intermingled; and each embittered the other.'[3] During the closing years of Elizabeth's reign, and throughout the Stuart period, the firmest champions of

Political results of the persecution of the Puritans.

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[1] [Gardiner, *Hist. Eng.* 1603–1642, i. 37, attributes the cooling of the House of Commons in its defence of the Puritans at least in part to the 'licence which the authors of a series of Puritan libels [the Mar-prelate libels] allowed themselves,' and to the spread of Brownist, or Independent, opinions, some of which, as H. Barrow's *Platform*, cited by Gardiner, went so far as to call upon the Queen to 'forbid and exterminate all other religions, worship, and ministers within her dominions.'—ED.]

[2] 35 Eliz. c. 1, 'An Act to retain the Queen's majesty's subjects in their due obedience.'

[3] Macaulay, Hist. Eng. i. [60].

Constitutional liberty against the arbitrary exercise of Royal power were drawn from the Puritan ranks.[1]

Civil government of Elizabeth.

The Ecclesiastical despotism of Elizabeth was, at least, a legal despotism, based on the extraordinary powers which Parliament in its wisdom had seen fit to confer upon the Crown. Religious liberty indeed was as yet totally unrecognised by the Constitution, either in theory or in practice:[2] for the Church was still regarded as the whole nation in its religious aspect, though in fact the Church and the Nation were ceasing to be co-extensive. But the despotic acts of Elizabeth's Civil government, though there was some excuse for them in the perils and dangers by which she was surrounded, and in the example of her immediate predecessors of the Tudor dynasty, were undoubtedly illegal, and known to be so by those who nevertheless submitted to them. Protests were from time to time uttered in Parliament, at first feebly and ineffectually, but gradually becoming more vigorous, until by the end of her reign the Opposition in the House of Commons was

Its despotic character.

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[1] 'The slavish Parliament of Henry VIII. grew into the murmuring Parliament of Queen Elizabeth, the mutinous Parliament of James I., and the rebellious Parliament of Charles I. The steps were many, but the energy was one—the growth of the English middle-class, using that word in its most inclusive sense, and its animation under the influence of Protestantism. No one, I think, can doubt that Lord Macaulay is right in saying that political causes would not alone have then provoked such a resistance to the sovereign, unless propelled by religious theory. . . . Gradually, a strong Evangelic spirit (as we should now speak), and a still stronger anti-Papal spirit, entered into the middle sort of Englishmen, and added to that force, fibre, and substance which they have never wanted, an ideal warmth and fervour which they have almost always wanted.' Bagehot, Eng. Const. 282.

[2] 'At the end of the 16th century, the simple proposition, that men for holding or declaring heterodox opinions in religion should not be burned alive, or otherwise put to death, was itself little else than a sort of heterodoxy; and, though many privately must have been persuaded of its truth, the Protestant churches were as far from acknowledging it as that of Rome. No one had yet pretended to assert the general right of religious worship, which, in fact, was rarely or never conceded to the Romanists in a Protestant country, though the Huguenots shed oceans of blood to secure the same privilege for themselves.' Hallam, Literature of Eur., i. 559. 'Even at the close of the 17th century, Bossuet was able to maintain that the right of the civil magistrate to punish religious error was one of the points on which both churches agreed; and he added that he only knew two bodies of Christians who denied it. They were the Socinians and the Anabaptists.' Lecky, Rationalism in Europe, ii. 59.

sufficiently strong and organised to compel the Queen and her Ministers to defer to its wishes.

Political trials unjustly conducted.

The administration of justice in all trials partaking in any degree of a political nature was characterised by that iniquitous straining of law and evidence in favour of the Crown, which was the common feature of all the Tudor reigns, and attained a still more disgraceful notoriety under the Stuarts. Hallam has denounced in eloquent language 'those glaring transgressions of natural as well as positive law, that rendered our courts of justice in cases of treason little better than the caverns of murderers. Whoever was arraigned at their bar was almost certain to meet a virulent prosecutor, a judge hardly distinguishable from the prosecutor except by his ermine, and a passive pusillanimous jury.'[1] The trials of Stubbe, of Penry, and of Udal, already referred to, are samples of the kind of justice meted out by the legal tribunals to all who were obnoxious to the court.[2] But besides the ordinary judicial tribunals there existed the two courts of High Commission and Star Chamber, respectively taking cognisance of all offences against the Ecclesiastical supremacy and the Royal prerogative of the Sovereign; special courts of Commissioners occasionally appointed for the trial of offences; and the Courts-Martial by which the Queen frequently superseded the operation of the Common Law. During a period of actual rebellion all governments have been wont to exercise the right of suspending the ordinary course of justice in favour of the more summary and awe-inspiring military tribunal. A Royal Proclamation, issued on the 1st of July, 1588, in the crisis of the Spanish invasion, directing that all persons importing or dispersing Papal Bulls, or disloyal or traitorous books, should be instantly proceeded against and punished by Martial law, was fairly justified, however unconstitutional in character, by the extraordinary perils of the time. But the hasty and

Courts Martial.

1588.

[1] Const. Hist. i. 231.
[2] *Supra*, pp. 476, 480.

arbitrary temper of Elizabeth led her to have recourse to this summary process when there existed no justification in the circumstances of the time. In 1573, one Peter Burchell, a Puritan, who was probably insane, attempted to murder the famous sea-captain John Hawkins, in mistake for Sir Christopher Hatton, the captain of the Queen's guard. Elizabeth wished to have him immediately executed by Martial law, and was with great difficulty persuaded by her Council to allow the Civil jurisdiction to take its ordinary course.[1] A much more violent and illegal proceeding took place in July, 1595. A street broil, devoid of all political character, having taken place one Sunday evening, between some riotous apprentices and the warders of the Tower, the Queen issued a commission to Sir Thomas Wyllford, appointing him provost-marshal, with power to punish by martial law. He was empowered 'to repair to all common highways near to the city, which any vagrant persons do haunt, and with the assistance of justices and constables, to apprehend all such vagrant and suspected persons, and them to deliver to the said justices, by them to be committed and examined of the causes of their wandering, and finding them notoriously culpable in their unlawful manner of life, as incorrigible, and so certified by the said justices, to cause to be executed upon the gallows or gibbet some of them that are so found most notorious and incorrigible offenders.'[2]

1573.

1595.

Illegal commitments.

Another intolerable grievance by which the people were oppressed under Elizabeth was the discretionary power which the Queen, and each member of her Privy Council, arrogated to themselves of committing to prison all persons who were on any account obnoxious to the Court. Every obstacle was thrown in the way of a prisoner suing out a writ of *habeas corpus;* and even when liberty had been

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[1] Strype, Ann. ii. 288. While imprisoned in the Tower, Burchell murdered one of his keepers, for which offence he was hanged in due course of law.

[2] Rymer, xvi. 279. Five of the apprentices were executed as traitors on Tower Hill, July 24.

obtained by order of a court of law, the person so discharged was frequently re-committed by order of the Council, while the officers of the court were imprisoned for having executed their duty. So flagrant were these abuses that, in 1591, the Judges ventured to present a joint remonstrance to Sir Christopher Hatton, Lord Chancellor, Sir William Cecil, and Lord Burleigh, the Treasurer. They desired that 'order may be taken that her highness's subjects may not be committed or detained in prison, by commandment of any nobleman or councillor, against the laws of the realm, to the grievous charges and oppression of her majesty's said subjects.' 'For divers,' the remonstrance continues, 'have been imprisoned for suing ordinary actions and suits at the common law, until they will leave the same, or against their wills put their matter to order, although sometime it be after judgment and accusation.[1] *Item:* Others have been committed and detained in prison upon such commandment against the law; and upon the queen's writ in that behalf, no cause sufficient hath been certified or returned. *Item:* Some of the parties so committed and detained in prison after they have, by the queen's writ, been lawfully discharged in court, have been eftsoones recommitted to prison in secret places, and not in common and ordinary known prisons, as the Marshalsea, Fleet, King's Bench, Gatehouse, nor the custodie of any sheriff, so as, upon complaint made for their delivery, the queen's court cannot learn to whom to award her majesty's writ, without which justice cannot be done. *Item:* Divers serjeants of London and officers have been many times committed to prison for lawful execution of her majesty's writs out of the King's Bench, Common Pleas, and other courts, to their great charges and oppression whereby they

Remonstrance of the Judges against them. 1591.

[1] In a patent, dated May 19, 1591, Elizabeth ['of our prerogative royal which we will not have argued nor brought in question,'] grants to Patrick, Lord Dunsany, an Irish nobleman, and John Mathewe, a gentleman of London, protection from all suits for debt for both person and property; and directs the judges of the different courts to stay any suit which might be commenced against them, 'without other warrant than the sight of these our letters patent or the enrolment thereof.'—Annals of England, Lib. ed. p. 340, *n.*

are put in such fear as they dare not execute the queen's process. *Item:* Divers have been sent for by pursuivants for private causes, some of them dwelling far distant from London, and compelled to pay to the pursuivants great sums of money against the law, and have been committed to prison till they would release the lawful benefit of their suits, judgments, or executions, for remedie, in which behalf we are almost daily called upon to minister justice according to law, whereunto we are bound by our office and oath.' Thus far the remonstrance of the Judges, having regard to the fact that they were removable from office at the Queen's pleasure, is a remarkably outspoken vindication of the right of personal freedom. But it concludes rather tamely, by leaving to the Executive government a great and dangerous latitude wholly inconsistent with the chartered liberties of the people. 'Whereas,' the Judges continue, 'it pleased your lordships to will divers of us to set down when a prisoner sent to custody by her majesty, her council, or some one or two of them, is to be detained in prison and not to be delivered by her majesty's courts or judges: We think that, if any person shall be committed *by her majesty's special commandment, or by order from the council-board,* or for treason touching her majesty's person, which causes being generally returned into any court, *is good cause for the same court to leave the person committed in custody.*'[1]

Illegal Proclamations.

The Royal Proclamations put forth under Elizabeth seem to show that the Crown then claimed not merely a kind of supplemental right of legislation, to perfect and carry out what the spirit of existing laws might require, but also 'a paramount supremacy, called sometimes the king's absolute or sovereign power, which sanctioned commands beyond the legal prerogative, for the sake of public safety, whenever the council might judge that to be in hazard.'[2] New offences, unknown to the common law, and affecting

[1] Lansdowne MS. lviii. 87, Brit. Mus., cited in Hallam, Const. Hist. i. 235
[2] Hallam, Const. Hist. i. 237.

the persons and property of whole classes of the Queen's subjects, were from time to time constituted by Royal Proclamation alone, and made punishable with fine and imprisonment.[1] The Press was placed under a strict censorship; and in 1585, at the instigation of Archbishop Whitgift, the trades of printing and book-selling were subjected to most stringent regulations by an ordinance of the Star Chamber, published to restrain the 'enormities and abuses of disorderly persons professing the art of printing and selling books.'[2]

Restrictions on printing and book-selling.

The frugality of Elizabeth, and the sums which she received from the fines of recusants and from the grant of monopolies for the exclusive sale of commodities, enabled her to avoid frequent applications to Parliament for money. This greatly increased her popularity, and caused subsidies to be granted, when applied for, with both liberality and readiness. She indeed occasionally had recourse to the ancient practice of forced loans from the wealthy, notwithstanding the statute of Richard III. against them. But she is honourably distinguished from her predecessors by the moderation and tact with which these loans were exacted and by her punctuality and speed in repayment.[3]

Economy of Elizabeth.

Revenue occasionally anticipated by means of forced loans; which were punctually repaid.

Very much of the credit, and a fair share of the odium,

Lord Burleigh's administration.

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[1] Hume goes so far as to assert, referring to the reign of Elizabeth, that 'in reality the Crown possessed the full legislative power by means of proclamations, which might affect any matter even of the greatest importance, and which the Star Chamber took care to see more vigorously executed than the laws themselves. The motives for these proclamations were sometimes frivolous and even ridiculous.'—Hist. Eng. v. 463.

[2] Strype, Whitgift, 222, Appendix, 94.

[3] 'In the time of Queen Elizabeth,' said Mr. Justice Hutton, in his judgment in the case of Ship Money, 'in the end of her reign, whether through covetousness or by reason of the wars which came upon her, I know not by what counsel, she desired benevolence; the statute of 2d Richard III. was pressed, yet it went so far that by commission and direction money was gathered in every Inn of Court; and I myself, for my part, paid twenty shillings. But when the Queen was informed by her judges that this kind of proceeding was against law, she gave directions to pay all such sums as were collected back; and so I (as all the rest of our house, and as I think of other houses too) had my twenty shillings repaid me again; and privy councillors were sent down to all parts, to tell them that it was for the defence of the realm, and it should be repaid them again.' State Trials, iii. 1199.

attaching to the government of Elizabeth, are of right due, not to her personally, but to the policy of her ministers, among whom Sir William Cecil, Lord Burleigh, stands pre-eminent. Under his administration England, it has been said, "was managed as if it had been the household and estate of a nobleman under a strict and prying steward. It was a main part of his system to keep alive in the English gentry a persuasion that his eye was upon them. No minister was ever more exempt from that false security which is the usual weakness of a court. His failing was rather a bias towards suspicion and timidity; there were times, at least, in which his strength of mind seems to have almost deserted him through a sense of the perils of his sovereign and country. But those perils appear less to us, who know how the vessel outrode them, than they could do to one harassed by continual informations of those numerous spies whom he employed both at home and abroad. The one word of Burleigh's policy was 'prevention'; and this was dictated by a consciousness of wanting an armed force or money to support it, as well as by some uncertainty as to the public spirit in respect at least of religion. But a government that directs its chief attention to prevent offences against itself is in its very nature incompatible with that absence of restraint, that immunity from suspicion, in which civil liberty, as a tangible possession, may be said to consist. It appears probable that Elizabeth's administration carried too far, even as a matter of policy, this precautionary system upon which they founded the penal code against popery; and we may surely point to a contrast very advantageous to our modern constitution in the lenient treatment which the Jacobite faction experienced from the princes of the House of Hanover. She reigned, however, in a period of real difficulty and danger. At such seasons few ministers will abstain from arbitrary actions, except those who are not strong enough to practise them."[1]

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[1] Hallam, Const. Hist. i. 247.

Puritan ascendancy in the House of Commons.

Throughout the reign of Elizabeth the predominant party in the House of Commons was composed of members more or less imbued with the Puritan doctrines. Amongst them were many bold and active spirits, well read in Constitutional lore, who gradually organised an opposition to the despotism of the Crown, and on several occasions successfully resisted all the efforts of the Court party.

Conflicts with the Crown: (1) As to settlement of the Succession.

The two principal subjects upon which conflicts arose between the Crown and Parliament were the settlement of the Succession to the Throne, and a further reformation in the Established Church. At first the efforts of the Commons were directed towards urging the Queen to marry, a request to which she always returned evasive answers. As the hope of her marriage grew fainter, and the fears of the popular party increased lest the claim of Mary, Queen of Scots, should be preferred to the title of the House of Suffolk, Parliament became more urgent for some 'proclamation of certainty already provided,' alluding to the settlement of the Succession under Henry VIII.'s will, 'or else by limitations of certainty if none be,' by means of a fresh Parliamentary settlement.[1] The Queen resolutely declined to pronounce between the conflicting claimants to the throne; a policy in which she appears to have been supported by Cecil, who thought that no limitation of the Crown could at that time be effected without great peril to the State. In 1566 this question gave rise to one of the most serious conflicts between the Crown and the Commons which had arisen since the days of Henry IV. Both Houses of Parliament united to importune the Queen to give way. In both very bold language was employed, and some Peers, members of the Queen's Council, are even said to have insisted in their places that Her Majesty ought to be compelled to take a husband, or else that a successor should be declared by Parliament against her will. Elizabeth met the attack with boldness and tact. The recalcitrant Peers were excluded from her presence until they

1566.

[1] D'Ewes' Journal, p. 82.

had made submission, and the Commons were induced, by the Ministers in their house, to modify their request that the Queen would name her successor, by coupling with it an alternative request that she would take to herself a husband. To this she returned a vague but courteous answer. The Commons, however, were not satisfied, and continued to discuss the question of the Succession. The Queen at length positively enjoined them, through the Speaker, to proceed no further in the business. Hereupon a member, Paul Wentworth, moved to know whether the Queen's command and inhibition were not against their liberties and privileges? Lengthened debates ensued, and at the expiration of several days the Queen, finding it advisable to give way, informed the Speaker that she revoked her former commandment and inhibition; 'which revocation,' says the Journal, 'was taken by the House most joyfully, with hearty prayer and thanks for the same.'[1]

Five years elapsed before the Queen summoned another Parliament. At its meeting in April, 1571, the Lord Keeper Bacon, in replying to the Speaker's customary demand of freedom of speech, said that 'her majesty having experience of late of some disorder and certain offences, which, though they were not punished, yet were they offences still, and so must be accounted, they would therefore do well to meddle with no matters of State but such as should be propounded unto them, and to occupy themselves in other matters concerning the commonwealth.'[2]

(2) As to Ecclesiastical reforms. 1571.

Silenced for a time on the question of the Succession, the Commons now turned their attention to another topic equally obnoxious to the Queen. In this session no fewer than seven Bills were introduced in the Lower House for a further reformation of Ecclesiastical affairs. Elizabeth was indignant at this interference with her supremacy, and

[1] Hallam, Const. Hist. i. 251.
[2] D'Ewes' Journal, p. 141.

Strickland, the mover of the Bills, was sent for to the Council and ordered not to appear again in his place in Parliament. This proceeding was noticed in the House as being a violation of Parliamentary privilege, and an injury not merely to himself but to his constituents whom he represented. The Ministers endeavoured to excuse his detention on the ground that it was occasioned not by anything spoken in the House, but by his having introduced Bills against the prerogative of the Queen. Mr. Yelverton, however, maintained that although the Queen's prerogative was to be upheld, it ought to be confined within reasonable limits; that as the Queen could not make the law, so she had no right to break it: and that as that House, where all things came to be considered, could determine the right to the Crown,—which it would be high treason to deny,—it could certainly entertain motions respecting religious ceremonies. Seeing the resolute attitude of the House, the Queen prudently permitted Strickland to return to his place.[1] This was an important victory for the Commons, who thenceforth displayed increased confidence in asserting their privileges against the arbitrary pretensions of the Crown.

Speech of Peter Wentworth in 1576.

In the Parliament of 1572 no opposition was shown; but at its next meeting, in February, 1575–6, a speech of remarkable boldness in defence of the liberties and privileges of the Commons was delivered by Peter Wentworth, Member for Tregony, in Cornwall,—a brother or other near relative of the Paul Wentworth who had earlier distinguished himself in the same cause. 'Sweet is the name,' he said, 'of liberty; but the thing itself a value beyond all inestimable treasure. So much the more it behoveth us to take care lest we, contenting ourselves with the sweetness of the name, lose and forego the thing.' 'In the last and preceding session,' he continued, 'I saw the liberty of free speech so much and so many ways infringed, and so many abuses offered to this honourable

[1] D'Ewes, 156, 175, 176.

council, as hath much grieved me; wherefore I do think it expedient to open the commodities that grow to the prince and state by free speech. Without this it is a scorn and mockery to call it a Parliament house; for in truth it is a school of flattery and dissimulation. Two things do great hurt here: one a rumour which runneth about the House, "Take heed what you do; the Queen's Majesty liketh not such a matter; whosoever preferreth it, she will be offended with him." On the contrary, "Her majesty liketh of such a matter; whosoever speaketh against it, she will be much offended with him." The other is a message sometimes brought into the House, either of commanding or inhibiting, very injurious to the freedom of speech and consultation. I would to God, Mr. Speaker, that these two were buried in hell; the King hath no peer or equal in the kingdom; but he ought to be under God and the law, because the law maketh him a king. A message was brought last session into the House, that we should not deal in any matters of religion, but first to receive from the bishops. Surely this was a doleful message, for it was as much as to say, ye shall not deal in God's causes.' He proceeded to express great indignation at the Queen's refusal to assent to the attainder of Mary of Scotland; boldly exclaimed, 'none is without fault, no, not our noble Queen, but has committed great and dangerous faults to herself;' rudely, but withal loyally, accused Her Majesty of ingratitude and unkindness towards her subjects; and declared that his only object was 'the advancement of God's glory, an honourable sovereign's safety, and a sure defence of this noble isle of England, by maintaining the liberties of this honourable council, the fountain from whence all these do spring.'[1] This direct attack upon the Queen alarmed the House of Commons. They deemed it prudent to anticipate any action from without by sequestering Wentworth, and appointing a committee of all the

[1] D'Ewes, 236; Parl. or Const. Hist. of Eng. to the Restoration, iv. 186. [1st. ed. p. 1751 *seq.*]

Privy Councillors in the House to examine him. On being assured that the committee sat not as councillors but as members of the Commons only, he submitted to their authority, and, on their report to the House, was committed to the Tower. After a month's confinement, the Queen informed the Commons that she had remitted her displeasure against him, and the House, having first exacted an acknowledgment of his fault upon his knees, released him with a reprimand from the Speaker.

Mr. Cope's Bill and Book, 1588.

Twelve years later, Peter Wentworth again suffered imprisonment for his bold resistance to the Queen's interference with the liberty of Parliament. In February, 1587–8, a Mr. Cope submitted to the House of Commons a very sweeping measure of Ecclesiastical reform, consisting of a Bill and a Book. By the Bill it was proposed to annul all laws affecting Ecclesiastical government then in force, and to establish a new form of Common Prayer, which was contained in the Book annexed. The Speaker ineffectually endeavoured to stop the reading of the Bill by alleging the Queen's commands not to meddle in the matter. A day was passed in discussing the question; but before the next meeting of the House, Her Majesty sent for the Speaker and obtained from him both Bill and Book. As soon as the House reassembled, Peter Wentworth submitted to the Speaker, for the purpose of being read to the House, a series of questions, of which the principal points were: 'Whether this House be not a place for any member freely and without controlment of any person, or danger of laws, by bill or speech, to alter any of the griefs of the commonwealth? Whether honour may be done to God, and benefit and service to the prince and state, without free speech? Whether there be any councils beside Parliament, which can make, add to, or diminish from, the laws of the realm? Whether it be not against the orders of this House to make any secret or matter of weight, here in hand, known to the prince or any other? Whether the Speaker, or any other, may interrupt any member in his speech in this House, or rise when he will, without con-

sent of the House, or overrule the House? Whether the prince and state can continue, stand, and be maintained, without the Parliament, except by altering the government of the state?' For these queries (which the Speaker declined to read to the House), Wentworth was again committed to the Tower; a fate which Cope and those members who had supported his motion also shared. At the dissolution of Parliament, three weeks afterwards, they were released.[1]

Parliament of 1593.

Elizabeth's definition of liberty of speech.

The Succession question again brought forward by Peter Wentworth.

At the opening of the Parliament which met in February, 1593, the Speaker having made the usual request of liberty of speech, received for answer: 'Privilege of speech is granted, but you must know what privilege ye have; not to speak every one what he listeth, or what cometh into his brain to utter; your privilege is *Ay* or *No*.'[2] On the first day of the session the undaunted Peter Wentworth, together with Sir Henry Bromley, another member, delivered a petition to the Lord Keeper desiring the Lords to be suppliants with the Lower House to her Majesty to entail the succession of the Crown, for which they had already prepared a Bill. For this boldness they were summoned before the Council and committed to prison.[3] A few days later, Morice, the Attorney of the Court of Wards, introduced a Bill to reform the practice of the Ecclesiastical courts, especially in the matter of the oath *ex officio*. The Queen immediately sent for the Speaker, who on his return informed the House that 'She wondered that any would be of so high commandment as to attempt a thing contrary to that which she had so expressly forbidden. Her majesty's present charge and command is, that no bills touching matters of state, or reformation in causes ecclesiastical, be exhibited. And upon my allegiance I am commanded, if any such bill be exhibited, not to read it.' Not content with this general reprimand, Morice himself

Bill for reform of the Ecclesiastical courts introduced by Morice, Attorney of the Court of Wards.

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[1] Parl. or Const. Hist. iv. 316; D'Ewes, 410.
[2] Parl. or Const. Hist. iv. 349.
[3] *Id.* iv. 365.

was arrested in his place, committed to prison, deprived of his office in the Court of Wards, and disabled from practising as a barrister.[1]

Causes of the general submissiveness of the Commons.

The submissiveness with which the majority of the Commons for so many years bowed to the haughty words and harsh acts of Elizabeth, was due in a great measure not to ignorance of their unconstitutional character or a lack of spirit to resist, but to a deep conviction of the perils and dangers which threatened the Reformed Church and the national independence, coupled with a firm reliance on the patriotic courage and wisdom of the Queen. For these reasons, during the greater part of her reign, 'the Puritans in the house of Commons, though sometimes mutinous, felt no disposition to array themselves in systematic opposition to the Government. But, when the defeat of the Armada, the successful resistance of the United Provinces to the Spanish power, the firm establishment of Henry IV. on the throne of France, and the death of Philip II., had secured the State and the Church against all danger from abroad, an obstinate struggle, destined to last through several generations, instantly began at home. It was in the Parliament of 1601 that the opposition which had, during forty years, been silently gathering and husbanding strength, fought its first great battle and won its first victory.'[2] The conflict arose concerning the enormous abuse of Monopolies. Under cover of the loosely defined prerogative possessed or assumed by the Crown of regulating all matters relating to commerce, the Queen had taken upon herself to make lavish grants to her courtiers, of patents to deal exclusively in a multitude of articles, mostly common necessaries of life. Coal, leather, salt, oil, vinegar, starch, iron, lead, yarn, glass, and many other commodities were in consequence only to be obtained at ruinous prices. The grievance was first mooted in Parlia-

Successful opposition to monopolies, 1601.

[1] Parl. or Const. Hist. iv. 396; Townsend, 60; D'Ewes, 478; Neal, Hist Purit. c. viii.

[2] Macaulay, Hist. Eng. i. [62–63].

ment in 1571, by a Mr. Bell: but he was at once summoned before the Council, and returned to the House 'with such an amazed countenance, that it daunted all the rest.'[1] After the lapse of twenty-six years the Commons ventured, in 1597, to present an address to the Queen on the same subject, to which she replied, through the Lord Keeper, that she 'hoped her dutiful and loving subjects would not take away her prerogative, which is the choicest flower in her garden, and the principal and head pearl in her crown and diadem; but would rather leave that to her disposition, promising to examine all patents and to abide the touchstone of the law.'[2] In spite of these fair words, the abuse, far from being abated, rose to a still greater height. So numerous were the articles subject to monopoly, that when the list of them was read over in the House in 1601, an indignant Member exclaimed, 'Is not bread amongst them? Nay, if no remedy is found for these, bread will be there before the next Parliament.'[3] A Bill 'for the explanation of the common law in certain cases of letters-patent' was introduced by Mr. Laurence Hyde, and was debated with unprecedented warmth for four days. The Ministers and courtiers, who endeavoured to support the prerogative, were overborne by a torrent of indignant and menacing eloquence. The populace openly cursed the monopolies, and declared that the prerogative should not be suffered to touch the old liberties of England. Seeing that resistance was no longer politic, or even possible, Elizabeth, with admirable tact, sent a message to the House, that, 'understanding that divers patents which she had granted had been grievous to her subjects, some should be presently repealed, some superseded, and none put in execution, but such as should first have a trial, according to the law, for the good of the people.' Robert Cecil, the secretary, added the more direct assurance that all existing patents should be revoked, and no others granted for the

[1] D'Ewes, Journal, 159.
[2] D'Ewes, p. 547.
[3] Parl. or Const. Hist. iv. 462.

future. Overjoyed at their victory, the Commons waited upon the Queen with an address of thanks, to which she replied in an affectionate and even apologetic tone. 'Never since I was a Queen,' she told them, 'did I put my pen to any grant but upon pretext and semblance made to me, that it was both good and beneficial to the subjects in general, though a private profit to some of my ancient servants who had deserved well. . . . Never thought was cherished in my heart that tended not to my people's good.'[1]

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[1] Parl. Hist. iv. 480.

POOR LAWS.—The year 1601 is remarkable not only for the victory of the Commons on the question of monopolies but also for the passing of the great statute, 43 Eliz. c. 2, 'An Act for the Relief of the Poor,' which is the foundation of our modern Poor Law.

Act for relief of the poor, 1601.

In pre-Norman times the State did not directly relieve poverty, but by enforcing by legal sanctions the payment of tithes to the Church, it may be said to have indirectly provided for the relief of the poor. In their inception tithes were voluntary offerings of the people, made under the belief—carefully inculcated by the clergy—of the religious duty of every Christian to bestow on God's service a tenth part of his goods. 'But it was not possible or desirable,' observes Bishop Stubbs (Const. Hist. i. 228), 'to enforce' this duty 'by spiritual penalties: nor was the actual expenditure determined except by custom, or by the will of the bishop, who usually divided it between the church, the clergy, and the poor. . . . The recognition of the *legal* obligation of tithes dates from the eighth century, both on the continent and in England. In A.D. 779 Charles the Great ordained that every one should pay tithe, and that the proceeds should be disposed of by the bishop: and in A.D. 787 it was made imperative by the legatine councils held in England, *which being attended and confirmed by the kings and ealdormen had the authority of Witenagemots.** From that time it was enforced by not unfrequent legislation . . the cathedral church being . . the normal recipient, and the bishop the distributor.' By a law

Relief of the poor in ancient times.

Tithes.

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* [Hardwick, *Church Hist. Middle Age*, p. 243, shews both the unpopularity of Legates in England and the constant and careful limitation of their powers. Robertson, *Hist. Christ. Church*, shews their unpopularity in England, vi. p. 200: describes the visit of the Legates in 785, 'the first, as they said, who had been sent into England since the time of Augustine,' and the Councils held 'in their presence' in Mercia and Northumbria, iii. 180; shews that the visits of Papal Legates to England had been 'very rare,' and that 'their authority had been limited to special business,' in connection with the visit of the Abp. of Vienne, afterwards Pope Calixtus II., in 1100, 'a few months after Anselm's return from his first exile,' and relates protests made through William of Warelwast, Bp. of Exeter, and prohibition of landing of a Legate in England, *t.* Hen. I., v. 20. It may not be easy to settle the exact position of the Councils held 785–7 'in the presence of' both Kings and Legates. Like some of the early Spanish Councils, they appear to have partaken of a mixed character, partly spiritual and partly temporal. In such cases the best doctrine would seem to be that the spiritual decrees produce a purely spiritual effect, and the temporal decrees a purely temporal effect.—ED.]

Privileges of Parliament vindicated.

The reviving independence of the House of Commons under the Tudor sovereigns, especially during the reign

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of Ethelred II. the tithes were directed to be applied, in accordance with the ancient usage, one-third to church fabrics, one-third to the clergy, and the remaining third to the poor. It was not until the council held in A.D. 1200 that the principle of the prior claim of the parochial clergy on tithes was summarily stated (Stubbs, Const. Hist. i. 229). In the Mirror of Justice (c. 1, s. 3) it is said to be the right of the poor to be 'sustained by parsons, rectors of the church, and the parishioners, so that none of them die for default of sustenance,' but the duty was one of imperfect obligation, there being no compulsory method of enforcing it. The clergy, however, more especially the monastic bodies, who, as impropriators of parochial benefices, had managed to secure a large portion of tithes, by no means neglected this duty; but unfortunately 'the blind eleemosynary spirit' which led them to practise and inculcate indiscriminate alms-giving had a direct tendency to foster 'that vagabond mendicity which unceasing and very severe statutes were enacted to repress.' By Edward III.'s Statute of Labourers (*supra*, p. 314) it was forbidden to give alms, under colour of charity, to the able-bodied poor; every man having no means of his own was to accept service under pain of imprisonment. By the 12 Richard II. begging was permitted, subject to regulations,—certificates might be given to poor men and women authorising them to beg within specified local limits.

Indiscriminate alms-giving of the clergy.

Edw. III.'s statute of Labourers: Almsgiving to the able-bodied forbidden.

Begging regulated by statute 12 Richard II.

Hen. VIII.'s Poor Laws.

Under Henry VIII. the same policy with regard to the poor was maintained, but with a great increase of severity. By the 22 Hen. VIII., c. 12, all beggars and vagrants—as well aged and impotent as able-bodied—were ordered to repair to the place of their birth. Justices of the peace were authorised to give licences to 'aged poor and impotent persons' to beg within certain prescribed districts, but licensed beggars transgressing their limits, and all unlicensed beggars were to be twice whipped and set in the pillory, and, on repeating the offence, to lose their ears. By the 27 Hen. VIII. c. 25, all cities, counties, towns, and parishes were directed to maintain their aged and impotent poor by voluntary alms, and to set the able-bodied to work; but 'valiant and sturdy beggars,' refusing to work, were to be punished by whipping for the first offence, loss of an ear for the second, and hanging for the third. By the same Act indiscriminate almsgiving was forbidden on pain of forfeiting ten times the value of the gift; but an offertory was to be made in every parish church on Sundays, to which the clergy were to exhort the people to contribute.

22 Henry VIII. c. 12.

27 Henry VIII. c. 25.

Suppression of the monasteries.

By the suppression of the monasteries the chief support of vagrant mendicity was withdrawn; and under Edward VI. and Elizabeth numerous statutes were passed enforcing with greater stringency and severity the provisions already in existence for the relief of the aged and impotent, and the punishment of the 'valiant and sturdy' poor.

Statute 43 Eliz. c. 2, 1601, the basis of modern poor-laws.

At length in 1601, the Act of 43 Eliz. introduced regular local taxation for the relief of the poor. Every parish was to be responsible for the maintenance of its own poor out of a rate to be levied on the landed property of the parish by 'overseers of the poor,' consisting of the churchwardens, and from two to four substantial householders nominated yearly by two justices of the neighbourhood. The rate was to be applied by the overseers (1) in providing work for all able-bodied persons who had no means to maintain themselves, and (2) in relieving the lame, impotent, old, blind, and such other persons as were poor and not able to work, and who had no parents, grand-parents, or children competent to maintain them.

Law of Settlement.

The Act of 43 Eliz. involved two principles: (1) the relief of the impotent and aged, and the providing work for the able-bodied, poor; (2) that this should be done *parochially*, each parish providing for its own poor. It had already been directed by certain earlier statutes that paupers unable or unwill-

of Elizabeth, is further evidenced in the care with which the peculiar privileges and immunities of Parliament were

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ing to work, should be compellable to remain in the particular parishes where they were *settled* (*i.e.* where they were born, or had resided for a certain period, varying from 1 to 3 years). But there was nothing to prevent able-bodied and industrious paupers from resorting to any parish that they pleased for employment; and the irregular and imperfect manner in which the Act of Elizabeth was for years carried out in many parishes caused a migration of poor into those which were better regulated. To relieve the latter from this unfair burthen an Act was passed in 1662 (14 Car. II. c. 12) providing that within 40 days after the coming of any person to settle in any parish, he might, on complaint of the churchwardens or overseers that his circumstances were such that he was likely to become a charge upon the parish, be *removed*, by the warrant of two justices, back to the parish in which he was born, or had been last settled for at least 40 days. Thus originated the law of *settlement*, which has been the subject of a vast amount of subsequent legislation and still retains a close connexion with the relief of the poor. (On the existing law of settlement, see Stephen, Commentaries, iii. 175–178.)

Administration of poor relief.

The relief of the poor in all its various details continued for more than a century under the uncontrolled management of the overseers, who, in too many instances, proved quite unequal to the duty of effectively working the Act.

Statute 9 Geo. I. c. 7. 1723.

In 1723, by 9 Geo. I. c. 7, churchwardens and overseers of parishes were empowered, with the consent of the vestry, to purchase or hire houses, or to contract with any person, for the lodging and employment of the poor; three small parishes were permitted to unite in establishing a single workhouse; and it was declared that such persons as declined to submit to the lodging provided for them should not be entitled to any relief. In 1782 Mr. Davies Gilbert's Act (22 Geo. III. c. 83) authorised parishes in which the adoption of the Act should be agreed upon by two-thirds in number and value of the owners and occupiers, to appoint *guardians* to act in place of overseers of the poor; and also to enter into voluntary unions with each other for the accommodation, employment, and maintenance of their paupers. In 1819 the Act 59 Geo. III. c. 12, empowered the vestry of any parish to commit the management of its poor to a committee of substantial householders, termed a *select vestry*, to whose directions the overseers should be bound to conform.

Gilbert's Act, 22 Geo. III. c. 83. 1782.

Select Vestry Act, 59 Geo. III. c. 12. 1819.

Ignorant administration of the poor-law: its disastrous effects.

Both the Gilbert Act and the Select Vestry Act being permissive only and not compulsory, the relief of the poor in the great majority of parishes continued to be administered by the overseers. Under their ignorant administration the wise and simple provisions of the law for the relief of the poor gradually assumed the proportions of a gigantic national evil. 'The industrial population of the whole country,' observes Sir Erskine May (Const. Hist. iii. 405), 'was being rapidly reduced to pauperism, while property was threatened with no distant ruin. The system which was working this mischief assumed to be founded upon benevolence: but no evil genius could have designed a scheme of greater malignity for the corruption of the human race. The fund intended for the relief of want and sickness,—of age and impotence,—was recklessly distributed to all who begged a share. Everyone was taught to look to the parish, and not to his own honest industry, for support.'

Poor-law Amendment Act, 1834.

At length, in 1834, on the recommendation of a Royal Commission appointed at the request of Parliament in the preceding year, to enquire into the state and administration of the laws relating to the poor, was passed the important 'Poor Law Amendment Act,' 4 & 5 Will. IV. c. 76. 'The principle was that of the Act of Elizabeth, to confine relief to destitution; and its object to distinguish between want and imposture. This test was to be found in the workhouse. Hitherto pauperism had been generally relieved at home, the parish workhouse being the refuge for the aged, for orphans and others, whom

from time to time vindicated. The cases of Ferrers in 1543, and of Smalley in 1575, (relating to the freedom of Members and their servants from arrest), and the cases of Nowell in 1553, and of the county of Norfolk in 1586, (as to the right of the House to determine contested elections), have been already considered in treating of the three principal privileges of the Commons.[1] But there was another species of privilege, relating to the internal discipline of the House,—the power to punish offences against the established order committed by any of themselves,—which though apparently at all times an essential attribute of any assembly enjoying the right of free debate, first begins to attract attention during the Tudor period.

Storie's case, 1548.

The Journal of the Commons records, under the date 21st January, 1547-8, that John Storie, one of the burgesses, was ordered to be committed to the custody of the

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The workhouse test for able-bodied poor.

it suited better than out-door relief. Now out-door relief was to be withdrawn altogether from the able-bodied, whose wants were to be tested by their willingness to enter the workhouse. This experiment had already been successfully tried in a few well-ordered parishes, and was now generally adopted. But instead of continuing ill-regulated parish workhouses, several parishes were united, and union workhouses established common to them all. The local administration of the poor was placed under elected boards of guardians; and its general superintendence under a central Board of Commissioners in London.' (May, Const. Hist. iii. 407.) The 'Poor Law Commissioners,' were appointed for five years, but the duration of the Commission was afterwards extended from time to time till 1847, when, by statute 10 & 11 Vict. c. 109, it was superseded by a new Commission, afterwards known as the 'Poor Law Board,' consisting of the Lord President of the Council, Lord Privy Seal, Home Secretary, and Chancellor of the Exchequer for the time being, and of such other persons as the Crown might appoint. In 1871, by statute 34 & 35 Vict. c. 70, the 'Poor Law Board' was abolished and its powers transferred to a new body called the 'Local Government Board' (in which was concentrated the supervision of the laws relating to the public health, the relief of the poor, and local government), consisting of a President, appointed by and holding office during the pleasure of the Crown, of the President of the Council, all the principal Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer.

Poor Law Commissioners, 1834.

Poor Law Board, 1847.

Local Government Board, 1871.

Within three years from the passing of the Act of 1834 its beneficial effects were manifested in a reduction, to the extent of three millions, in the annual expenditure for the relief of the poor. Some of the provisions of the Act have since been partially relaxed; and the strict and universal application of the workhouse test can hardly be hoped for, until supplemented by an efficient organisation of private charity, working in independent but harmonious correlation with the public system, for the relief of industrious and deserving persons in temporary difficulties, who, by timely aid, may be kept from falling into the ranks of paupers.

[1] *Supra*, pp. 344–5, 351.

Serjeant of the House. On the next day but one, articles of accusation were read against him, and on the following day the Commons, of their single authority, committed him to the Tower. The exact nature of his offence is not stated, but he is known to have been a zealous opponent of the Reformation, and would appear to have made use of language disrespectful alike to the House and to the government of the Protector Somerset. On the 20th of March Storie sent a letter from the Tower with a full submission; whereupon the Commons made an order 'that the King's privy council in the Nether House shall humbly declare unto the Lord Protector's grace that the resolution of the House is, that Mr. Storie be enlarged, and at liberty, out of prison; and to require the King's Majesty to forgive him his offences in this case towards his Majesty and his council.' Under Queen Mary, Storie again fell under the censure of the House for disrespect to the Speaker; and in the same reign Thomas Copley, member for Gatton, was committed by the House to the custody of their Serjeant for disrespectful words uttered of her Majesty. With less regard for their privileges, they directed the Speaker to declare this offence to the Queen, and solicit her mercy for the offender.[1]

Copley's case, 1558.

The next case is more important, constituting as it does the leading precedent, so far as records show, for the power of the House to expel a member. Arthur Hall, a burgess for Grantham, was charged with having, on account of certain proceedings of the last session of Parliament, wherein he was privately interested, caused to be published a book, 'not only reproaching some particular good members of the House, but also very much slanderous and derogatory to its general authority, power and state, and prejudicial to the validity of its proceedings in making and establishing of laws.' He had previously incurred the displeasure of the Commons in 1572, when he was ordered to appear at the bar 'to answer for sundry lewd speeches,

Hall's case, 1581.

Expulsion of a member.

[1] Hallam, Const. Hist. i. 272.

used as well in the House as elsewhere.' On another occasion he had been 'charged with seven several articles, but, having humbly submitted himself to the House and confessed his folly, was released with a good exhortation from the Speaker.' Regarded now as incorrigible, he was expelled the House, fined 500 marks, and sent to the Tower, where he remained until the dissolution of Parliament.[1]

Dr. Parry's case, 1585.

The right of expulsion was again exercised by the Commons in 1585, against William Parry, D.C.L., a burgess for Queenborough, for denouncing as cruel and bloody the Bill to inflict the penalty of death on Jesuits and seminary priests; and so tenacious were they of their dignity, that in the following year they caused a poor currier named Bland, on account of contemptuous words uttered against the House, to be brought to their bar, whence he was discharged only on making submission and paying a fine of twenty shillings.[2]

Bland's case, 1585.

Bribery at elections punished.

Long's case, 1571.

It was in the reign of Elizabeth also, that the earliest precedent occurs for the punishment of bribery at elections. In 1571, the House inflicted a fine upon the borough of Westbury for receiving a bribe of four pounds from Thomas Long, the Member returned, who is described as 'a very simple man and of small capacity to serve in that place.' The Mayor was also ordered to refund the bribe: but Long, the briber, does not appear to have been expelled or otherwise punished.[3]

Commons assert their right to originate Money Bills. 1593.

In 1593 an attempt was made by the Lords to encroach upon the Commons' privilege of originating Money Bills. A message was sent from the Upper House referring to the Queen's want of a supply, and requesting that a committee of conference might be appointed. This was acceded to; but it soon appeared that there was a difference of opinion between the Upper and Lower Houses. Sir

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[1] D'Ewes, 291; Hallam, Const. Hist. i. 273. In addition to the misconduct mentioned in the text, Hall was suspected of being privy to the fraud committed by his servant Smalley in 1575: see *supra*, p. 345.

[2] D'Ewes, 366; Hallam, Const. Hist. i. 274.

[3] Commons' Journals, p. 88.

Robert Cecil was instructed to report from the committee that the Lords would not consent to grant anything less than three subsidies, while the Commons wished to give only two. Hereupon Mr. Francis Bacon (afterwards the celebrated Chancellor) rose, and while disclaiming any wish to refuse a subsidy, 'disliked that this House should join with the Upper House in granting it. For the custom and privilege of this House hath always been, first to make offer of the subsidies from hence, then to the Upper House; except it were that they present a bill unto this House, with desire of our assent thereto, and then to send it up again.' The Court party tried hard to bring about another conference with the Lords, but their motion to that effect was lost on a division by 217 to 128.[1]

The Constitution, though frequently violated in practice, remained theoretically intact.

Notwithstanding the arbitrary practice of Elizabeth's government, and the submissive and adulatory strain in which she was always addressed by the Commons, it is evident that the theory of the Constitution, as a monarchy greatly limited by law, remained intact. The facts already cited might be regarded as sufficient proof of this assertion, but it is supported by still further evidence of much weight.

Aylmer's *Harborowe of True and Faithful Subjects.* 1559.

In the 'Harborowe of True and Faithful Subjects,' published in 1559 by Aylmer, afterwards Bishop of London, in answer to John Knox's celebrated treatise against female monarchy entitled 'A blast of the Trumpet against the Monstrous Regiment of Women,'[2] the author thus enumerates his reasons why, in England, 'it was not so dangerous a matter to have a woman ruler as men take it to be:' 'First, it is not she that ruleth, but the laws, the executors whereof be her judges appointed by her, her justices, and such other officers. Secondly, she maketh no statutes or laws, but the honourable court of Parliament; she breaketh none, but it must be she and they together,

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[1] D'Ewes, 486; Hallam, Const. Hist. i. 276.

[2] Knox's 'Blast' was written in the time of Queen Mary and directed against her, but it was of course equally applicable to her sister Elizabeth.

or else not. If on the other part the régiment were such as all hanged on the king's or queen's will, and not upon the laws written; if she might decree and make laws alone without her senate; if she judged offences according to her wisdom, and not by limitation of statutes and laws; if she might dispose alone of war and peace; if, to be short, she were a mere monarch, and not a mixed ruler, you might peradventure make me to fear the matter the more, and the less to defend the cause.'[1]

Mr. Speaker Onslow's address to the Queen. 1566.

Again, in 1566, Mr. Onslow, then Solicitor-general and Speaker of the Commons, addressing Queen Elizabeth at the conclusion of the session said: 'By our common law, although there be for the prince provided many princely prerogatives and royalties, yet it is not such as the prince can take money or other things, or do as he will at his own pleasure without order; but quietly to suffer his subjects to enjoy their own, without wrongful oppression; wherein other princes by their liberty do take as pleaseth them.'[2]

Harrison's *Description of England.* 1577.

Harrison, in his 'Description of England,' published in 1577, says of the Parliament: 'This House hath the most high and *absolute* power of the realm; for thereby kings and mighty princes have from time to time been deposed from their thrones; laws either enacted or abrogated; offenders of all sorts punished; and corrupted religion either disannulled or reformed. To be short, whatsoever the people of Rome did in their *centuriatis* or *tribunitiis comitiis*, the same is and may be done by authority of our Parliament House, which is the head and body of all the realm, and the place wherein every particular person is intended to be present, if not by himself, yet by his advocate or attorney. For this cause also, anything there

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[1] Harborowe of True and Faithful Subjects, 1559, cited by Brodie, Hist. Brit. Emp.—Title in margin 'It is less danger to be governed in England by a woman than anywhere else.' Aylmer afterwards presents a picture of the wretchedness of the French, and compares their condition, and that of other continental states, with the situation of England.

[2] D'Ewes, p. 115.

enacted is not to be misliked, but obeyed by all men without contradiction or grudge.'[1]

Hooker's *Ecclesiastical Polity.*

That the same theory of the Constitution prevailed in the later period of Elizabeth's reign is evidenced by the words of the judicious Hooker in his 'Ecclesiastical Polity.'[2] 'I cannot choose,' he says, 'but commend highly their wisdom, by whom the foundations of this commonwealth have been laid; wherein, though no manner person or cause be unsubject unto the king's power, yet so is the power of the king over all and in all limited, that unto all his proceedings the law itself is a rule. The axioms of our regal government are these: "*Lex facit regem*"—the king's grant of any favour made contrary to the law is void;—"*Rex nihil potest nisi quod jure potest.*" . . . what power the King hath he hath it by law; the bounds and limits of it are known, the entire community giveth general order by law how all things publicly are to be done; and the King as the head thereof, the highest in authority over all, causeth, according to the same law, every particular to be framed and ordered thereby. The whole body politic maketh laws, which laws give power unto the King; and the King having bound himself to use according to law that power, it so falleth out that the execution of the one is accomplished by the other.'[3]

Sir Thomas Smith's *Commonwealth.*

Similar views of the Constitution—vaguely and somewhat timidly expressed it is true—are found in the 'Commonwealth of England' of Sir Thomas Smith, one of Elizabeth's Secretaries of State.[4]

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[1] Harrison's Description of England, cited by Brodie, Hist. Brit. Emp.

[2] [On Hooker, his intellectual characteristics, and the influence exercised by his great work, see Gardiner, *Hist. Eng.*, 1603–1642, i. 39–41, where the 'more than theological significance' of the book is noted. 'It was the sign of the reunion of Protestantism with the new learning of the Renaissance. . . . Religion began to partake of the many-sidedness of the world around it, and Hooker was a worthy peer of Spenser and of Shakespeare.'—Ed.]

[3] Hooker, Ecclesiastical Polity, bk. viii. [c. ii. 13]. The first four books were published in 1594; the fifth in 1597; the remaining three not till forty-seven years after his death, which happened in the year 1600. The sixth book, though written by Hooker, did not belong to this work; the real sixth book appears therefore to have been lost. See Keble's edition.

[4] Smith's Commonwealth, book ii. c. 3. This work was not published till 1589, twelve years after the author's death.

On the other hand a novel theory—utterly unknown to the ancient English Constitution—of an absolute and paramount power inherent in the very nature of the Regal office, had already found not a few supporters among the lawyers and courtiers of Elizabeth's reign. It was only after long years of bitter conflict, after the decapitation of one monarch and the deposition of another, that this theory of government which the Stuart dynasty adopted, developed, and pushed to its extreme logical results, was at length finally vanquished by the ancient free principles of the Constitution which it had attempted to supplant.

[Interesting illustrations of social life, and of the position both of Recusants and of the Puritan party under Elizabeth, will be found in the *Journ. Derbysh. Arch. Soc.*, 1885, in a Paper on the Fitzherberts of Norbury, by Rev. J. C. Cox, and in the *Yorksh. Arch. and Top. Journ.*, 1884, in a history of the Stapeltons of Yorkshire, by H. E. Chetwynd-Stapylton. In the brief chapter devoted to Elizabeth by M. Glasson, *Hist. du Dr. et des Inst. Pol. de l'Angl.*, v. 36–47, readers unfamiliar with mediæval history might be led to suppose that the term Anglican Church, or Church of England, was a post-Reformation invention, instead of being, as the Reformation Statutes of Henry VIII. recognise, the regular mediæval designation in use in the most formal documents, *e.g.*, Magna Charta. And in explaining the Thirty-Nine Articles, M. Glasson certainly uses language open to grave misconstruction, in saying that the English King, under these Articles, takes the place of the Pope, and is "aussi puissant pour décider du dogme, pour faire administrer les sacrements, pour conférer à d'autres la puissance spirituelle, que l'ait jamais été le pontife romain lui-même" (*op. cit.* v. 39, 40, *n.*). But Art. xxxvii. explicitly denies to Princes "the ministering either of God's Word, or of the Sacraments," and Article xxxvi. expressly approves the Ordinal set forth under Edw. VI. The *Congé d'élire*, which may possibly have misled M. Glasson, is itself a witness, however imperfectly, to the persistency of the doctrine of Magna Charta, '*quod Anglicana Ecclesia libera sit, et habeat jura sua integra, et libertates suas illaesas.*' Gardiner, *Hist. Eng.* 1603–1642, i. 41–43, has some striking remarks on the position of affairs during the last years of Elizabeth's reign, and at its close. 'Those last fifteen years of Elizabeth,' he says, 'in truth were years in which many opposing elements were being fused together into harmonious co-operation. The work of the Tudors had been to complete the edifice of national independence by nationalising the Church. In the course of the arduous struggle they had claimed and had obtained powers greater than those possessed by any former English kings. The very success which they had attained rendered those powers unnecessary. The institutions established by them had outlived their purpose. . . . As Elizabeth grew old it was generally felt that great changes were impending. She herself knew that it must be so. . . . She had cleared the way for liberty, though she understood it not.'—ED.]

CHAPTER XIII.

THE STUART PERIOD. (1603-1688.)

I. FROM THE ACCESSION OF JAMES I. TO THE PASSING OF THE PETITION OF RIGHT.

JAMES I. 1603–1625. Tendency of political and religious thought at his accession. The Puritan party.

JAMES I. came to the English throne at a critical period of our history. The reactionary movement towards despotism, which began under Henry VI., reached its climax under Henry VIII., and had since been slowly receding before the reviving spirit of freedom. During the latter years of Elizabeth the Puritan party had become organised and powerful. Whilst the old Queen lived, they were, for the most part, content to postpone the active assertion of the rights of the people against the Crown. They looked forward with hope to the advent of her successor, in the expectation of voluntary concessions; but were determined in any case to carry out further reforms in the Ecclesiastical system, and to insist upon all the ancient privileges of Parliament, and all the legal liberties of the subject. Violent changes were not, however, generally desired. Although there was a party hostile to the Hierarchy, the bulk of the Puritans had no desire to abolish Episcopacy,[1] and would

[1] [This cannot be accepted as an accurate statement of the Ecclesiastical position, considering the public defence of the Presbyterian system by Cartwright, while holding office as Professor of Divinity in the University of Cambridge, which was naturally regarded as a public challenge by Whitgift, then Archbishop of Canterbury. And, as a matter of fact, adherents of the Presbyterian system had been imprisoned both at Oxford and Cambridge by Grindal. It is impossible to question the fact that a distinct Presbyterian party had taken shape in England during the latter part of Elizabeth's reign, and that no mere concessions on Ritual matters could or would have satisfied it. Gardiner, *Hist. Eng.* 1603–1642, i. c. 1, especially pp. 22, 23, and 26, is very clear on these points, and equally strong in his assertion of the impossibility of England, as a Nation, ever embracing Presbyterianism.—ED.]

have been fully satisfied with a dispensation from certain ceremonies which too forcibly reminded them of the religion they had renounced. The Presbyterian education of James had led them to anticipate a ready acquiescence in such a moderate measure of reform. But the King's experience of the Presbyterian clergy had, in fact, been productive of prejudices the very opposite to what the English Puritans had expected. 'The Scotch clergy,' observes Mr. Brodie, 'full of the highest ambition, had converted the pulpit into a theatre for political declamation; and James had imbibed the bitterest hostility to everything which approached to the Presbyterian form of ecclesiastical establishment, declaring that under it Jack and Tom and Dick and Will presumed to instruct him in affairs of state.'[1] Under the tuition of the celebrated George Buchanan, James had acquired more learning than he had understanding to digest. Puffed up with literary pride and self-sufficiency, he imagined himself possessed of supereminent wisdom, while in reality lacking the judgment of a man of ordinary abilities. The Duc de Sully called him 'the wisest fool in Europe,'—a phrase which epigrammatically sums up the peculiarities of the King's intellect.[2]

Effect of James's Presbyterian education.

His political antipathy to Nonconformity.

The avowed antipathy of James to every kind of Protestant Nonconformity, was based on political, rather than on religious, reasoning. 'The Presbytery,' he said, 'agreeth as well with monarchy as God with the devil.' He was convinced that the Hierarchy was the firmest support of the Crown, and that where there was no Bishop there would soon be no King. He determined, therefore, to allow not

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[1] Brodie, Hist. Brit. Emp. i. 332.

[2] [For a fairer estimate of James's power, see Gardiner, who says, *Hist. Eng.* 1603–1642, i. 48–9, 'His mental powers were of no common order; his memory was good, and his learning, especially on theological points, was by no means contemptible. He was intellectually tolerant, anxious to be at peace with those whose opinions differed from his own. He was above all things eager to be a reconciler, to make peace where there had been war before, and to draw those to live in harmony who had hitherto glared at one another in mutual defiance. He was penetrated with a strong sense of the evil of fanaticism.' That 'these merits were marred by grave defects,' the history of his reign in England sufficiently shews.—ED.]

the slightest toleration to Nonconformists, a resolution in which he was confirmed by the fulsome flattery of the prelates, some of whom, at the Hampton Court Conference, did not hesitate to ascribe to him immediate inspiration from Heaven.[1]

While sternly repressing the nonconforming Protestants, James at the same time shewed an inclination to grant some partial indulgence to the Roman Catholics,—a policy which excited disgust and jealousy throughout the kingdom, and thus strengthened the hands of the Puritan faction.[2]

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[1] On his journey to London, the Puritan clergy presented to the King what is commonly called the 'Millenary Petition,' because it purported to proceed from 'more than 1000 ministers,' though the actual number of those who signified their assent to it is said not to have exceeded 825. It contained nothing inconsistent with the established hierarchy; but the petitioners prayed for 'a reformation in the church service, ministry, livings, and discipline.' In order to obtain further information on the points in dispute, James summoned the famous conference at Hampton Court between the Archbishop of Canterbury, eight Bishops, five Deans and two Doctors on the one side, and Dr. Reynolds and three other Puritan divines on the other. At the conference, which was held before the King on the 14th, 15th, and 16th of January, 1603–4, instead of acting as moderator, James, eager to display his theological learning, assumed the part of advocate for the Church. Transported with admiration, the Primate exclaimed that 'his majesty spoke by the special assistance of God's spirit;' and the Bishop of London said 'his heart melted within him to hear a king, the like of whom had not been since the time of Christ.' (Howell's State Trials, ii. 86, 87.) Some slight alterations in the Book of Common Prayer were made after the Conference; but ten of the men who had presented the Millenary Petition were committed to prison, 'the judges having declared in the star chamber that it was an offence fineable at discretion, and very near to treason and felony, as it tended to sedition and rebellion.' Hallam, Const. Hist. i. 298. [The facts concerning the so-called Millenary Petition have been much in dispute. Fuller's assertion, *Church Hist.*, v. 265, that it only had 750 signatures, is criticised by Gardiner, *Hist. Eng.* 1603–1642, i. 148, who says, 'the fact seems to have been that there were no signatures at all to it,' basing on the assertion of the Petitioners themselves in a subsequent Defence of the Petition, Brit. Mus. Add. MS. 8978, 'Neither before were any hands required to it, but only consent.' This seems clear on that point. As to the number of those who signified their consent, the Petitioners were probably not unwilling to magnify it. Gardiner notes that the Petition was 'very different from those which had been drawn up early in Elizabeth's reign, in which the abolition of Episcopacy and the compulsory introduction of Presbyterianism had been demanded,' but at the same time remarks that the 'demands could not, of course, be granted as they stood.'—ED.]

[2] James soon found it necessary, in order to free himself from the imputation of Papistry with which the Puritans assailed him, to cause the penal laws against the Catholics to be put into execution. After the discovery of the Gunpowder Plot additional severity was added to the statutes in force by two Acts 'containing more than seventy articles inflicting penalties on the Catholics in all their several capacities of masters, servants, husbands, parents, children,

Arbitrary nature of his Civil government.

The Civil government of James was no less impolitic and arbitrary than his Ecclesiastical. At a time when the growing spirit of freedom, the general diffusion of knowledge, and the revived study of Greek and Roman authors[1] had caused a Republican tendency to manifest itself in Parliament, and among the people, this alien King,—who, having been legally excluded from the English throne by the testament of Henry VIII.,[2] had no title to it but such as he derived from the will of the English people,—was constantly asserting, in the most offensive form, the novel and monstrous theory of his Divine right to absolute and irresponsible sovereignty. The doctrine had already been advanced by him some years before in Scotland, in a treatise on the 'True Law of Free Monarchies.'[3] Adopted by the Hierarchy[4] and the courtiers, the theory of Divine Right was later on elaborated into a system by Filmer,[5] and

Theory of Divine Right.

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heirs, executors, patrons, barristers, and physicians.' (3 James I. c. 4, 'For the better discovering and repressing of Popish recusants;' and 3 James I. c. 5, 'To prevent and avoid dangers which grow by Popish recusants.' See also 7 James I. c. 2 and c. 6.)

[1] On the powerful influence of the Classical writings in the direction of liberty, see Lecky, Rationalism in Europe, ii. 218. Hobbes (born 1588, died 1679) says in the Leviathan (ch. xxix.) 'Inter rebellionis causas maximas numerari potest librorum politicorum et historicorum quos scripserunt veteres Graeci et Romani lectio. . . . Mihi ergo monarchiis nihil videtur esse damnosius posse, quam permittere ut hujusmodi libri publice doceantur, nisi simul a magistris sapientibus quibus venenum corrigi possit remedia applicentur. Morbum hunc comparari libet cum hydrophobia,' &c.

[2] [Reference has already been made, *sub* Hen. VIII.'s reign, to Bailey's *Succession to the English Crown*, for a more guarded expression of the force of this alleged testamentary settlement of the Crown, which should be balanced against this very decided, and it is believed, too decided, expression.—ED.]

[3] King James's Works, p. 207.

[4] In 1604, Convocation drew up a set of Canons, 141 in number, which received the Royal assent, but never having been sanctioned by Parliament are not legally binding upon the laity. Besides declaring every man to be excommunicated who should question the complete accordance of the Prayer Book with the word of God, they denounce as erroneous a number of tenets believed to be hostile to Royal government, and inculcate the duty of passive obedience to the King, in all cases without exception.

[5] Sir Robert Filmer wrote his famous 'Patriarca' in the reign of Charles I., but it was not published till after the restoration of Charles II. He maintained that 'All government is absolute monarchy. No man is born free; and, therefore, could never have the liberty to choose either governor or form of government. The father of a family governs by no laws but his own. Kings, in the right of parents, succeed to the exercise of supreme jurisdiction. They are above all laws. They have a divine right to absolute power, and are not answerable to human authority.'

became the distinctive badge of the more violent High-churchmen and Tories. 'It was gravely maintained that the Supreme Being regarded hereditary monarchy, as opposed to other forms of government, with peculiar favour; that the rule of succession in order of primogeniture was a Divine institution, anterior to the Christian, and even to the Mosaic dispensation; that no human power, not even that of the whole legislature, no length of adverse possession, though it extended to ten centuries, could deprive a legitimate prince of his rights; that the authority of such a prince was necessarily always despotic; that the laws, by which, in England and in other countries, the prerogative was limited, were to be regarded merely as concessions which the sovereign had freely made and might at his pleasure resume; and that any treaty which a king might conclude with his people was merely a declaration of his present intentions, and not a contract of which the performance could be demanded.'[1]

A conflict with the House of Commons inevitable.

Such being the ideas of the King on Regal government, it was inevitable that he should speedily come into conflict with the House of Commons, a body fully aware of its ancient rights and privileges, impressed with the duty of asserting and maintaining them, and strong in the consciousness that it represented the feelings and wishes of the great majority of all classes of the nation.[2]

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[1] Macaulay, Hist. Eng. i. [71]. The sublime pretensions of James were rendered ludicrous, as well as irritating, by the contemptible demeanour of the King himself. Cf. Green, Short Hist. of Eng. People, pp. 464, 467. [As it is not contended that James created himself, animadversions on his accent, manners, and temperament, seem to be beside the mark. His notions of the Divine Right were either true or false, but they clearly cannot be allowed to stand or fall with the accidents of his external appearance.—ED.]

[2] Towards the end of the 16th, and during the earlier part of the 17th century, the House of Commons included among its members a large body of men of ability, recruited especially from amongst the lawyers, who became known to the electors by the talent which they displayed at the bar. 'The services which this class of men rendered to the cause of freedom were incalculable. The learning of the ablest lawyers in the 16th century may have been small in comparison with the stores of knowledge which may be acquired in our own day; but, relatively to the general level of education, it stood far higher. A few years later a race of parliamentary statesmen would begin to arise from amongst the country gentlemen: but, as yet, almost all pretensions

James is the aggressor.

The very first acts of James's reign were ominous of the arbitrary manner in which he designed to rule his new kingdom. On his journey to London he ordered a thief, taken in the fact, to be executed without the formality of a trial;[1] and in the Proclamation summoning his first Parliament he was guilty of a daring infringement upon the privileges and independence of the House of Commons. He took upon himself to specify the kind of men who were to be elected, and directed that all returns should be sent to his Court of Chancery, and that such as should be *there* found contrary to the Proclamation should be rejected as 'unlawful and insufficient.'[2]

First Parliament, 1603–4. *Session I.* March 19th–July 7th.

James' first Parliament met on the 19th March, 1603–4. It was felt that a struggle with the Crown was at hand. So large was the attendance of Members in their places that additional seats had to be provided. In answer to the Address from the Throne, the Speaker, Sir Edward Phelips,[3] was careful to remind the King of the limited nature of his Regal powers: 'New laws,' he said, 'could not be instituted, nor imperfect laws reformed, nor inconvenient laws abrogated, by any other power than that of the high court of

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to statesmanship were confined to the council-table and its supporters. For the present, the burthen of the conflict in the Commons lay upon the lawyers, who at once gave to the struggle against the Crown that strong legal character which it never afterwards lost.'—S. R. Gardiner, Hist. Eng. from 1603 to 1616, i. 178.

[1] 'I hear our new king,' said Sir John Harrington, 'has hanged one man before he was tried; it is strangely done. Now, if the wind bloweth thus, why may not a man be tried before he has offended?'—Nugæ Antiquæ, i. 180. [Proof of this alleged execution would be desirable.—ED.]

[2] Parl. Hist. i. 967. [This action, however wrong and indefensible in itself, was no innovation on the practice of recent English governments, except as regards Chancery. Gardiner, *Hist. Eng.* 1603–1642, i. 163, shews from the Egerton Papers, 384, that of the 'two sets of notes for the proclamation,' it is that in Lord Chancellor Ellesmere's hand which 'alone contains the direction for the reference of disputed elections to Chancery, showing that this assumption originated with him.' Motives of personal arbitrariness do not seem fairly imputable to a King when he is found to have been following the advice of his Chancellor.—ED.]

[3] [Sir Edward Phelips, the Speaker, 1st Parl. Jac., and who had filled the same office *t.* Eliz., as well as the high Judicial post of Master of the Rolls, was fourth son of Thomas Phelips, Esq., of Barrington and Montacute, co. Somerset, and father of Sir Robert Phelips, M.P. for Somersetshire, *t.* Car., sent to the Tower, 1621–2 (*post*, p. 553). The Baronetcy of Phelips of Barrington became extinct 1690. Cf. Burke, *Gen. Armory*, 1878.—ED.]

Parliament, that is, by the agreement of the Commons, the accord of the Lords, and the assent of the Sovereign: that to the King belonged the right either negatively to frustrate, or affirmatively to ratify; but that he could not institute: every bill must pass the two Houses before it could be submitted to his pleasure.'

Privileges of the Commons vindicated.

The first business of the Commons was the vindication of their exclusive right to determine contested elections, against the attempt of James to transfer the decision of such cases to his Court of Chancery. Another of their privileges, freedom from arrest, was also energetically asserted, and received for the first time a distinct legislative recognition.[1]

Complaints of grievances.

During a long and stormy session the Commons freely discussed their various grievances; the ancient abuse of purveyance, which, notwithstanding thirty-six restraining statutes, still flourished with scarcely diminished vigour; the hardships of feudal guardianship in chivalry; the monopolies of the great foreign trading companies, and several other matters of complaint. After granting the usual duties of tonnage and poundage for the King's life, they concluded by placing on record a remarkable protestation of their rights and liberties, drawn up by a Committee of the House, and entitled '*A Form of Apology and Satisfaction to be delivered to his Majesty.*' In this important Constitutional document the Commons commence by expressing a desire to justify their own conduct and to remove from the King's mind certain misinformations under which he appeared to be labouring: namely, first, That the privileges of the Commons were not held of right, but of grace only, renewed every Parliament by way of donative, upon petition; secondly, that they are no Court of Record, nor yet a court that can command view of

Commons' justification of their proceedings.

[1] See the cases of Sir Thomas Shirley, and of Goodwin and Fortescue, *supra*, pp. 346, 352. During the discussion on Goodwin's case, James informed the Commons that 'he had no purpose to impeach their privilege, *but since they derived all matters of privilege from him, and by his grant*, he expected that they should not be turned against him.'

records, but that the attendance with the records is courtesy not duty; and lastly, that the examination of the returns of writs for knights and burgesses is without their compass and belonging to the Chancery: assertions against which, as 'tending directly and apparently to the utter overthrow of the very fundamental privileges of our House, and therein of the rights and liberties of the whole Commons of the realm of England, which they and their ancestors from time immemorial have undoubtedly enjoyed,' they protest, 'in the name of the whole Commons of England, with uniform consent, for themselves and their posterity.' In contradiction to these misinformations the Commons avouched: (1) 'That our privileges and liberties are of right and due inheritance no less than our very lands and goods; (2) That they cannot be withheld from us, denied, or impaired, but with apparent wrong to the whole state of the realm; (3) That our making of request, in the entrance of Parliament, to enjoy our privileges, is an act of manners only, and doth not weaken our right, no more than our sueing to the King for our lands by petition, which form, though new and more decent than the old *praecipe*, yet the subject's right is no less now than of old; (4) That our House is a Court of Record and so ever esteemed; (5) That there is not the highest standing court in this land that ought to enter into competency, either for dignity or authority, with this high court of Parliament, which, with your Majesty's royal assent, gives laws to other courts, but from other courts receives neither laws nor orders; (6) And lastly, that the House of Commons is the sole proper judge of the return of all such writs and of the election of all such members as belong unto it, without the which the freedom of election were not entire; and that though your Majesty's Court of Chancery send out these writs and receive the returns and preserve them, yet the same is done only for the use of Parliament, over which neither the Chancery, nor any other court, ever had, or ought to have, any manner of jurisdiction.' Further on they inform the King that in regard to the late Queen's 'sex and age

Assertion of Privileges by Commons in *Form of Apology*, 1603-4.

which we had great cause to tender, and much more upon care to avoid all trouble, which by wicked practice might have been drawn to impeach the quiet of your Majesty's right in the succession, [a gentle hint at the legal and other difficulties which had stood in the way of James's claim to the throne], actions were then passed over which we hoped in succeeding times to redress and rectify; whereas, contrarywise in this Parliament, not only privileges, but the whole freedom of the Parliament and realm, hath from time to time, on all occasions, been mainly hewed at.' They then enter into particulars of the various matters which had arisen during the session—the business of Goodwin's election, of Sir Thomas Shirley's arrest, and other causes of complaint. 'For matter of religion,' they assure his Majesty that he would be misinformed 'if any man should deliver that the kings of England have any absolute power in themselves, either to alter religion, (which God forefend should be in the power of any mortal man whatsoever,) or to make any laws concerning the same, otherwise than, as in temporal causes, by consent of Parliament.' Touching their own desires and proceedings therein, there had been not a little misconception and misinterpretation. 'We have not come,' they said, 'in any Puritan or Brownist[1] spirit to introduce their parity, or to work the subversion of the State ecclesiastical as it now stands, things so far and so clear from our meaning as that, with uniform consent, in the beginning of this Parliament we committed to the Tower a man who out of that humour had, in a petition exhibited to our House, slandered the Bishops; but according to the tenor of your Majesty's writs of summons directed to the counties from which we came, and according to the ancient and long-continued use of Parliaments, as by many records from time to time appeareth, we came

[1] The 'Brownists' took their name from Robert Browne, a kinsman of Lord Burleigh, and at one time chaplain to the Duke of Norfolk. His principles were ['no doubt,' says Blunt, *Dict. Sects*, &c.,] those afterwards held by the Independents. [To same effect, Gardiner, *Hist. Eng.* 1603–1642, i. 37. The passage as to powers to make laws concerning religion, Gardiner takes, *Ibid.*, 183, to refer to the Canons of 1604.—Ed.]

with another spirit, even with the spirit of peace; we disputed not of matters of faith and doctrine, our desire was peace only, and our device of unity, how this lamentable and long-lasting dissension amongst the ministers (from which both atheism, sects, and ill-life have received such encouragement and so dangerous increase) might at length, before help come too late, be extinguished. And for the ways of this peace we are not addicted at all to our own inventions, but ready to embrace any fit way that may be offered. Neither desire we so much that any man, in regard of weakness of conscience, may be exempted after Parliament from obedience to laws established, as that in this Parliament such laws may be enacted as by relinquishment of some few ceremonies of small importance, or by any way better, a perpetual uniformity may be enjoined and observed.' They conclude by assuring the King that 'Our care is, and must be, to confirm the love, and to tie the hearts of your subjects, the Commons, most firmly to your Majesty. . . . Let no suspicion have access to their fearful thoughts that their privileges, which they think by your Majesty should be protected, should now by sinister information or counsel be violated or impaired, or that those who with dutiful respect to your Majesty speak freely for the right and good of their country shall be oppressed or disgraced. Let your Majesty be pleased to receive public information from your Commons in Parliament, as well of the abuses in the Church as in the Civil State and Government. For private informations pass often by practice. The voice of the people, in things of their knowledge, is said to be as the voice of God. And if your Majesty shall vouchsafe, at your best pleasure and leisure, to enter into gracious consideration of our petitions for ease of those burthens under which your whole people have long time mourned, hoping for relief by your Majesty, then may you be assured to be possessed of their hearts for ever, and if of their hearts then all they can do and have.'[1]

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[1] Parl. Hist. i. 1030, and State Papers, Dom. viii. 70 [1603–10, p. 122. Gardiner, *Hist. Eng.* 1603–42, i. 183–5.—ED.]

In this free and outspoken yet thoroughly conservative and monarchical address, the Commons of England, at the commencement of their conflict for liberty with the House of Stuart, took up the position which they resolutely maintained during eighty-four long and stormy years. 'To understand this Apology,' remarks Mr. S. R. Gardiner, 'is to understand the causes of the success of the English Revolution. They did not ask for anything which was not in accordance with justice. They did not demand a single privilege which was not necessary for the good of the nation as well as for their own dignity. In every point they were emphatically in the right, while in some point or other, the King, the Council, the House of Lords, the Bishops, and the Puritans, were no less emphatically in the wrong. Their cause was just, and with the knowledge that the nation would support them, they could afford to wait with patience.'[1]

Sessions II. and III. 1605–6, Jan. 21–May 27, 1606, Nov. 18–July 4, 1607.

During the next two sessions of Parliament (January 21st, 1605-6, to May 27th; and November 18th, 1606, to July 4, 1607) constant bickerings occurred between the King and the Commons, but unmarked by any very decisive assertion of Prerogative on the one hand or of Privilege on the other. In the session of 1606, the rule that the same Bill cannot be proposed twice in the same session was established, probably for the first time, by the action of the Lords, who peremptorily rejected a Bill respecting purveyance which the Commons sent up to them very shortly after they had thrown out a previous Bill to the same effect. In the session of 1607 the Commons, at the King's request, expelled and imprisoned one of their members, Sir Christopher Pigott[2] (who had been chosen for Buckinghamshire on the resignation of Sir Francis Goodwin), for slanderous aspersions cast upon the national character of the Scots. But this was rather a confirmation of their jurisdiction over their own members than any surrender of

Expulsion of Sir Christopher Pigott. [1607.]

[1] S. R. Gardiner, Hist. Eng. (1603–1616), i. 208. [The words after 'dignity' are absent in Gardiner, *Hist. Eng.* 1603–42, i. 183.—ED.]

[2] [Hence, 'Pigotts,' = slanderers of the Scots. Cf. *N. & Q.*, 7th S. ix. 68, 475, *s. v.* 'Piggot.'—ED.]

their privileges. Three days after the speech had been uttered, the King sent them a message 'how much he did mislike and tax the neglect of the House, in that the speech was not interrupted in the instant and the party committed before it became public, and to his highness' ear.' They hesitated for some time; 'they knew not,' they said, 'what way to censure him for it, freedom of speech in their House was a darling privilege.' But it was evident that the King had just cause to complain, and, after resolving that Pigott, being a member of the House, was not liable to be called in question elsewhere, they determined, in the exercise of their own discretion, to punish the intemperance of their own member.[1] During both sessions the principal subject of discussion was James's favourite, but premature, scheme for a perfect union between England and Scotland, so that all his subjects might enjoy the same rights and be amenable to the same laws. But the proposition was repugnant to both English and Scotch, in whom the national prejudices and animosities of ages still warmly glowed, and the only result was the passing of an Act (4 Jac. I. c. 1.) by which all hostile laws between the two kingdoms, extending from the 7th Richard II. (1383) to the reign of Elizabeth, were repealed.[2]

Proposed union between England and Scotland.

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[1] Com. Journ. i. 335. [Though committed to the Tower, he was released within a fortnight. Gardiner, *Hist. Eng.* 1603–42, i. 330.—ED.]

The Post-nati. Calvin's case, 1608.

[2] The King was anxious to have a declaratory Act pronouncing that the union of the crowns had effected a mutual naturalisation of the *post-nati* (*i.e.*, persons born after his accession to the throne of England), and also an enabling Act conferring the same right upon the *ante-nati*. The English House of Commons was averse to this proposal, and the King, knowing that the opinions of the Judges were favourable to the *post-nati*, determined to get the point settled out of Parliament by an English court of law. A piece of ground was accordingly bought in the name of Robert Calvin [*rectè* Colville, see *n. post.* —ED.], an infant, born at Edinburgh in 1605, and an action was then brought in his name against two persons who, by collusion, were supposed to have deprived him of his land. This raised the question as to whether Calvin was an alien, as, in that case, he would be disabled from holding land in England. It was held by twelve Judges out of fourteen, in the Exchequer Chamber, that the Scotch *post-natus* was a natural-born subject of the King of England.—*Calvin's case*, 2 St. Tr. 559, 7 Jac. I., 1608. [Cf. Denman's Broom's *Const. Law*, 1885, pp. 4–56. In Dr. Broom's note, Lord Bacon is cited as holding *Calvin's case* to be one 'of exceeding great consequence.' But much of its doctrinal importance has been swept away by the Naturalisation Act, 1870. Gardiner, *Hist. Eng.* 1603–1642, i. 355, states that he was a grandson of Lord Colville of Culross. There would seem to be no doubt that the name is

Parliament not summoned from 1607, July 4, to Feb. 9, 1609–10.

Offended at the Commons' bold assertion of their privileges and constant complaints of grievances, James allowed an interval of two years and a half to elapse without meeting his Parliament. In want of money, but unwilling to apply for a legislative grant, he had recourse to the unconstitutional expedient of increasing the duty on imports by his own sole authority. In 1606 the King had directed the collectors of customs to demand a duty of 5*s.* per cwt. on all currants imported, in addition to the 2*s.* 6*d.* granted by the statute of tonnage and poundage. John Bates, a merchant of the Levant Company, refused to pay the additional impost, alleging that it was illegal without the authority of Parliament. An information was exhibited against him in the Court of Exchequer, and a unanimous decision of the four Barons was soon given for the Crown. But the language of Chief Baron Fleming and Baron Clark (the

Illegal impositions on merchandise.

Bates's case, (the '*Case of Impositions*') 1606.

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erroneously written Calvin in the English reports. Gardiner himself writes it 'Colvill,' and accounts for the error by saying that the name is 'frequently written Colvin,' presumably in Scotland. The genealogical accounts under the title in Burke's *Peerage*, 1890, and Anderson's *Scottish Nation*, Edinb., Fullarton, 1865–6, vary considerably in detail both as to the issue of the first and second Lords Colville of Culross, and as to the date of the creation, which last Burke gives as 10 Mar., 1604, but Anderson as late as 20 Jan., 1609. While this title, under the Decreet of Ranking, 1606, stood next before Scone, or Scoon, variously stated by Burke as cr. 1605 and 1608, it would seem that in 1723 it was placed after Cardross, cr. either by Ch., 1606, or by Parl. ratification, 1610, and before Cranstoun, cr. 1609, which seems to lead to 1608 for Scone and 1606 for Cardross. There is, however, no room for a Robert Colville as grandson of Sir James Colville of Easter Wemyss, 1st Lord Colville of Culross, in the pedigree as given either by Burke or Anderson; Robert, Master of Colville, who died *v.p.*, 1615, having been apparently father of an only son, James, 2nd Lord, stated by Burke to have been father of William, 3rd Lord, and James, 4th Lord, but by Anderson alleged to have died in 1640, *s.p.* In an interesting local history, *Culross and Tulliallan*, by D. Beveridge, Edinb., Blackwood, 1885, it is stated, i. 182, on the authority of researches by a member of the family, that James, 2nd Lord, did not die till 1655, was thrice married, and by his second wife left two sons, William, 3rd Lord, and John, 4th Lord, who both seem to have died young, the latter about 1667. This corrected genealogy, however, has no Robert, 'grandson' of Lord Colville of Culross, and it may be that the infant of *Calvin's case* was a son of Robert Colville of Cleish, illegitimate son of the 1st Lord and ancestor of the Lords Colville of Ochiltree. But this seems doubtful, as Robert, son of the first Colville of Cleish succeeded his father in 1560. The title of Colville of Ochiltree, subsequently borne by the illegitimate descendants of the 1st Lord Colville of Culross, was not created till 1651. It is, under the circumstances, impossible to say precisely who was the Robert Colville, b. 1605, and called by Gardiner a 'grandson' of Lord Colville of Culross, though the correction of Colville for Calvin is clearly to be accepted.—ED.]

only two whose judgments are reported) was even more subversive of liberty than the actual decision itself. They maintained that 'the king's power is twofold, ordinary and absolute. His ordinary power is for the profit of particular subjects, for the execution of civil justice in the ordinary courts, and is called by civilians *jus privatum*, with us common law: it cannot be changed without Parliament. The king's absolute power, on the contrary, is applied not for the benefit of particular persons, but for the general benefit of the people, and is *salus populi*. This power is not directed by the rules of common law, but is properly termed policy or government, varying according to the wisdom of the king for the common good. The matter in question is material matter of State, and ought to be governed according to the rules of policy by the king's extraordinary power. All customs (=duties) be they old or new, are the effects of foreign commerce: but commerce and all affairs with foreigners, war and peace, and all treaties whatsoever, are made by the absolute power of the king; he therefore who has power over the cause, has power also over the effect. No exportation or importation can be but at the king's ports. But the seaports are the king's gates which he may open or shut to whom he pleases.' As to the statutes alleged on the part of the defendant, limiting the King's prerogative to impose duties, Baron Clark maintained the monstrous proposition that Edward III. in giving his assent to the Act of the 43rd of his reign, c. 4 (forbidding any new impositions to be laid on wool or leather), 'did not bind his successors.'[1]

Even while the case was pending the merchants hastened to appeal to the House of Commons; and in the Petition of Grievances presented by the House at the end of the session of 1606 a request was included that the Impositions might cease to be levied, as no such duty could legally be demanded without the consent of Parliament.

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[1] Judgment (abridged) in *Bates's case* (the 'Case of Impositions'), 2 St. Tr. 371, [and Denman's Broom's Const. Law, 246–9.—ED.]

When the Commons reassembled in November, James informed them of the legal decision in his favour, and for a time the matter was allowed to drop. But the King soon determined to make a more extensive use of this power of taxation which the Judges had declared to be vested in the Crown. On the 29th of July, 1608, a Book of Rates was published under the authority of the Great Seal, imposing heavy duties upon almost all mercantile commodities, 'to be for ever hereafter paid to the King and his successors, on pain of his displeasure.'

The 'Book of Rates.' 1608.

At length the financial difficulties of the King compelled him again to summon Parliament.[1] The lawyers in the Lower House had in the meantime been looking into the legal authorities, and were now prepared to dispute the decision of the Judges in the Case of Impositions. Notwithstanding a message from the King forbidding them to discuss the question, the Commons were not to be deterred. During a four days' debate the illegality of Impositions was conclusively shown from statutes and precedents, in the elaborate and luminous arguments of Hakewill, Yelverton, and Whitelocke. The house was almost unanimous against the Crown. They presented a strong remonstrance to the King on his attempt to prevent discussion, claiming 'as an ancient, general, and undoubted right of Parliament, to debate freely all matters which do properly concern the

Session IV. 1609–10. Feb. 9–July 23.

Remonstrance against Impositions.

[1] Special precautions were taken to obtain a majority favourable to the Crown. 'During the long interval which had passed since the last session several vacancies had occurred. To four, at least, of the constituencies which had seats at their disposal [the Treasurer] Salisbury made applications in favour of nominees of his own. The answers which he received throw some light upon the manner in which elections were at that time conducted,'—Gardiner, Hist. Eng. (1603–1616), i. 449; and see State Papers, Dom. [1603–10, pp. 550, 551, 556], xlviii. 109, 116; xlix. 10. [Among these replies the following are not the least instructive and worth citation. The Bailiffs of Eye distinctly state that they 'will elect the person nominated by his Lordship,' but add that they 'hope he will be no charge to their poor corporation.' Most of those who gave up their rights to Government seem to have asked and expected a *quid pro quo* in some shape, according to their several needs. Mr. Hender, in yielding Bossiney, 'solicits that he may not be elected Sheriff of the county.' This was presumably to avoid the expenses attendant on serving that office. The Bailiffs of Boroughbridge, with effusive loyalty, 'think their refusal of his [Salisbury's] request for grant of a burgess-ship worse than death itself.'—Ed.]

subject; which freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved.' With regard to the Impositions and judgment in the Exchequer, 'the reasons whereof extended much farther, even to the utter ruin of the ancient liberty of this kingdom, and of the subjects' right of property in their lands and goods,' they remind the King that 'the policy and constitution of this your kingdom appropriates unto the kings of this realm, with the assent of the Parliament, as well the sovereign power of making laws as that of taxing or imposing upon the subjects' goods or merchandises wherein they have justly such a property as may not, without their consent, be altered or changed:' that whenever former kings, 'occasioned either by their wars, or their over-great bounty, have without consent of Parliament set impositions either within the land or upon commodities exported or imported by the merchants,' the Commons 'have in open Parliament complained of it, in that it was done without their consents, and thereupon never failed to obtain a speedy and full redress, without any claim made by the kings of any powers or prerogative in that point:' that 'these famous kings for the better contentment and assurance of their loving subjects agreed that this old fundamental right should be further declared and established by Act of Parliament, wherein it is provided that no such charges should ever be laid upon the people, without their common consent, as may appear by sundry records of former times.' They proceed: 'We, therefore, your Majesty's most humble Commons assembled in Parliament, following the example of this worthy care of our ancestors, and out of a duty to those for whom we serve, finding that your Majesty, without advice or consent of Parliament, hath lately, in time of peace, set both greater impositions, and far more in number than any your noble ancestors did in time of war, have with all humility presumed to present this most just and necessary Petition unto your Majesty: That all impositions set without the assent of Parliament may be quite abolished and taken away; and that your

Majesty, in imitation likewise of your noble progenitors, will be pleased that a law may be made during this session of Parliament to declare that all impositions set, or to be set, upon your people, their goods and merchandises, save only by common assent in the Parliament, are and shall be void.'[1] A Bill was introduced and passed through the Commons enacting that no Imposition, other than those already in existence, should thereafter be laid without consent of Parliament, but it was thrown out by the Lords. The Judgment in *Bates's case* continued therefore to afford the shelter of a legal decision for the arbitrary exactions of the Crown.

Complaints against the High Commission Court, and Royal Proclamations.

Besides the question of Impositions, the Commons brought forward a number of other grievances. They especially complained of the High Commission Court; of the abuse of Proclamations, 'by reason whereof' they said, 'there is a general fear conceived and spread amongst your Majesty's people, that Proclamations will by degrees grow up and increase to the strength and nature of laws; whereby not only that ancient happiness,—freedom,—will be much blemished (if not quite taken away), which their ancestors have so long enjoyed; but the same may also, in process of time, bring a new form of arbitrary government upon the realm, and this their fear is the more increased by occasion of certain books lately published, which ascribe a greater power to proclamations than heretofore had been conceived to belong unto them.' Dr. Cowell, reader in Civil Law at the University of Cambridge, had recently published, under the patronage of Archbishop Bancroft, a Law Dictionary called 'The Interpreter,' containing most extravagant assertions in support of the King's absolute power. Under the title 'King' was written: 'He is above the law by his absolute power; and though for the better and equal course in making laws he do admit the Three Estates unto council, yet this in divers learned men's opinion is not of constraint, but of his own benignity,

Cowell's *Interpreter.*

[1] Petyt, Jus Parl. 322, 323.

or by reason of the promise made upon oath at the time of his coronation. And though at his coronation he take an oath not to alter the laws of the land, yet, this oath notwithstanding, he may alter or suspend any particular law that seemeth hurtful to the public estate. Thus much in short, because I have heard some to be of opinion that the laws are above the King.' Of the Parliament it is asserted: 'Of these two, one must needs be true, that either the King is above the Parliament, that is, the positive laws of this kingdom, or else that he is not an absolute king. . . . . And, therefore, though it be a merciful policy, and also a politic mercy (not alterable without great peril) to make laws by the consent of the whole realm, because so no one part shall have cause to complain of a partiality, yet simply to bind a prince to or by those laws were repugnant to the nature and constitution of an absolute monarchy.' Further on he 'holds it incontrollable that the King of England is an absolute king,' and 'that subsidies were granted by Parliament in consideration of the king's goodness in waving his absolute power to make laws without their consent.'[1] The Commons were so incensed at these opinions, more especially as the King was reported to have spoken in praise of the book, that they requested a conference on the subject with the Lords. But before any further steps had been taken, James thought it expedient to express his displeasure at the imprudent language of this too zealous advocate of prerogative, and a Proclamation was shortly afterwards issued prohibiting the purchase, uttering, or reading of the book, and calling in all copies issued.[2]

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[1] Cowell's 'Interpreter,' ed. 1607, articles 'King,' 'Parliament,' 'Prerogative,' 'Subsidy.'

[2] Lord Salisbury reported to the House of Lords that the King had acknowledged that, although he derived his title from his ancestors, 'yet the law did set the crown upon his head,' 'and that he was a king by the common law of the land.' He 'had no power to make laws of himself, or to exact any subsidies *de jure*, without the consent of his three estates, and, therefore, he was so far from approving the opinion, that he did hate those that believed it.' —Parl. Deb. in 1610 (Camden Society), p. 24, cited by Gardiner, Hist. Eng.

The remonstrance of the Commons on the subject of Proclamations was not unproductive of good. Sir Edward Coke, Chief Justice of the King's Bench, was sent for to attend the Council, and was asked by Salisbury (1) whether the King could by Proclamation prohibit the building of new houses in London (with the object of checking what was regarded as the overgrowth of the capital), and (2) whether he could in the same way forbid the manufacture of starch from wheat (so as to preserve the latter for consumption as food only). Coke replied that it was a matter of great importance, on which he would confer with the

Answer of the Judges as to the legality of Proclamations.

(1603–1616). In the Proclamation suppressing the 'Interpreter,' James took care to improve the occasion, by himself exalting the Regal dignity to a level with the Deity: 'This later age and times of the world wherein we are fallen,' it begins 'is so much given to verbal profession, as well of religion as of all commendable moral virtues, but wanting the actions and deeds agreeable to so specious a profession, as it hath bred such an unsatiable curiosity in many men's spirits, and such an itching in the tongues and pens of most men, as nothing is left unsearched to the bottom both in talking and writing. For from the very highest mysteries in the Godhead and the most inscrutable counsels in the Trinity, to the very lowest pit of Hell, and the confused actions of the devils there, there is nothing now unsearched into by the curiosity of men's brains. Men not being contented with the knowledge of so much of the will of God as it hath pleased him to reveal, but they will needs sit with him in his most private closet and become privy of his most inscrutable counsels; and therefore it is no wonder that men in these our days do not spare to wade in all the deepest mysteries that belong to the persons or state of *Kings and Princes, that are Gods upon earth:* since we see (as we have already said) that they spare not God himself. And this licence that every talker or writer now assumeth to himself is come to this abuse, that many Phormios will give counsel to Hannibal, and many men that never went of the compass of cloysters or colleges will freely wade by their writings in the deepest mysteries of monarchy and politick government: whereupon it cannot otherwise fall out, but that when men go out of their element, and meddle with things above their capacity, themselves shall not only go astray and stumble in darkness, but will mislead also divers others with themselves into many mistakings and errors; the proof whereof we have lately had by a book written by Dr. Cowell called the Interpreter; for he being only a civilian by profession, and upon that large ground of a kind of Dictionary (as it were) following the alphabet, having all kind of purposes belonging to government and monarchy in his way by meddling in matters above his reach, he hath fallen in many things to mistake and deceive himself: In some things disputing so nicely upon the mysteries of this our monarchy, that it may receive doubtful interpretations; yea in some points very derogatory to the supreme power of this Crown: in other cases mistaking the true state of the Parliament of this Kingdom and the fundamental constitutions and privileges thereof: and in some other points speaking unreverently of the Common Law of England and the works of some of the most famous and ancient Judges therein; it being a thing utterly unlawful to any subject, to speak or write against that law under which he liveth, and which we are sworn and are resolved to maintain. Wherefore,' &c. See the Proclamation in Preface to the 1708 edit. of the 'Interpreter.'

King James's Proclamation suppressing the 'Interpreter.'

other Judges. To this the Council reluctantly agreed, and Chief Justice Fleming, Chief Baron Tanfield, and Baron Altham were appointed to consider the matter in conjunction with him. Shortly afterwards the four Judges delivered their opinion in the presence of the Privy Council. The King, they said, could not create any new offence by his proclamation; for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment. But the King might admonish his subjects to keep the existing laws, on pain of punishment to be inflicted by the law. Further, the King could not by proclamation make an offence punishable in the Star Chamber, if it were not already by law under the jurisdiction of that Court. They also formally declared that the King had no prerogative but what the law of the land allowed him. By their firmness on this occasion the Judges rendered an important service to their country. A check was given to the exercise of arbitrary power in this direction, and for some time no Proclamation imposing fine and imprisonment was issued.[1]

The *Great Contract.*

Another measure which occupied much of the attention of the King and Parliament during this and the following session was what was termed the *Great Contract.* The Commons were desirous of getting rid of the irksome incidents of tenure in chivalry and the right of purveyance. After a great deal of negotiation between the parties, it was at length agreed that the King should receive the sum of £200,000 yearly as compensation for the abolition of both these feudal sources of revenue. The matter was adjourned to the next session of Parliament: but in the meantime the Commons had grown lukewarm. They were impressed with a sense of the insecurity of any contract made with the King in face of the doctrines maintained by himself and by the Court lawyers, of a paramount Royal prerogative uncontrollable by any statute. They were

Session V. 1610. Oct. 16-Dec. 6.

[1] 12 Reports, 74.

apprehensive that if the King's wants were fully supplied by a permanent grant, he might in future be tempted to govern without summoning Parliaments: they were especially dissatisfied with his steady refusal to admit of any change, however slight, in the ceremonial of the National Church, or of any reform in the system of the Ecclesiastical Courts, whose jurisdiction the Bishops were persistently attempting to emancipate from all control by the Courts of Common Law. James, too, on his part, appears to have become less eager to carry out the Contract. It was represented to him that after all he would not gain much by the bargain; that by a little more care in managing the Crown lands, by putting in force with the utmost rigour all the rights which he possessed against his subjects, he might obtain the required revenue without having recourse to Parliament, and so retain his prerogative undiminished.[1] It became evident that the scheme must fall through; and Salisbury then pressed the Commons for a supply for the King's immediate necessities. But the Commons were in no humour to grant a subsidy unless the whole of their just grievances were redressed. If the King would not give way they were determined to fall back upon their right to refuse supplies. Some sharp things were said of the king's prodigality to his Scotch favourites; impatient and angry, he adjourned the House; and shortly afterwards the Parliament was finally dissolved, after an existence of nearly seven years.[2]

Parliament dissolved, 9 Feb. 1611.

For the next three years James endeavoured to rule without having recourse to Parliament. His great difficulty was the financial one. His own extravagance, and the prodigality with which he rewarded the worthless favourites of his Court, had involved him in a heavy debt and raised

James attempts to rule without the aid of Parliament, [1611–14].

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[1] Gardiner, Hist. Eng.[1603–1616] i. 478; Parl. Deb. 1610 (Camd. Soc.), p. 163.

[2] ['The dissolution of 1611,' says Green, *Hist. Eng. People*, iii. 82, 'proclaimed to the whole people a breach between two powers which it had hitherto looked upon as one. . . . It carried to every shire and every borough the news that the Monarchy had broken with the Great Council of the realm.' —Ed.]

the ordinary expenditure far above the Crown revenues. A vigorous effort was made to raise funds. Loans on Privy Seals were demanded, often unsuccessfully, from such as were supposed most capable of bearing the burthen; the arrears of fines inflicted in the Star Chamber were rigorously exacted; the King of France was induced to pay up an old debt of £65,000; the Dutch were successfully pressed to liquidate their debt, contracted with Elizabeth, by annual instalments of £40,000; several peerages were sold at £10,000 a piece; and a new order of hereditary knights, called Baronets, was created, each of whom paid £1000 for his patent. In addition, large sums were raised by the sale of Crown lands. But such resources were clearly temporary and inadequate. At the beginning of 1614 the king's liabilities amounted to £680,000 as contrasted with £300,000 at which they had stood at the opening of the session of 1610, whilst the actual expenditure exceeded the income by £200,000.[1]

Means resorted to in order to raise money.

His financial difficulties.

For some time it had been evident that Parliament must be summoned; a course which had always been consistently recommended to the King by Bacon and by Sir Henry Nevill, who, though an Opposition member in the late Parliament, had since been seeking the post of Secretary of State. In a very statesmanlike memorial Nevill assured the King that it was a mistake to suppose that the opposition in the late Parliament had arisen from factious motives. He had himself lived on familiar terms with the leaders of the Opposition, and was able to affirm without fear of contradiction that they bore no ill-will towards the King. He was ready to undertake for the greater part of them that, if the King would act fairly by his people, he would find these men ready to exert themselves in support of the Government. It would, of course, be necessary to grant certain things upon which those who would be called to pay the subsidies had set their hearts. Let the King

The *Undertakers.*

[1] For the financial details of James's reign from 1603 to 1616, see Gardiner, Hist. England.

consider what had been demanded, and what had been promised in the last session, granting the most reasonable of the Commons' requests, in addition to performing all his own promises. Let him avoid any speech likely to excite irritation; and appear confident of the Parliament's good affections, yielding what he meant to yield without waiting to be pressed. Let him communicate such proposals as he wished to lay before the Commons, not through a member of the House of Lords, but either by his own mouth or by such of his ministers as were members of the Lower House, and let him request the Commons to nominate a Committee which might confer with him on all points on which any difference should arise between them.[1]

Bacon also strongly advised the King to summon a Parliament, but his advice was much less straightforward and moral than that of Sir Henry Nevill. He submitted that there were many expedients for judiciously managing a House of Commons; that some of those who had been most forward in opposing were now won over, such as Nevill, Yelverton, Hyde, Crewe, Dudley Digges; that much might be done through intimidation or flattery towards filling the House with well-affected persons, winning or blinding the lawyers—the '*literae vocales* of the House'—and drawing the country gentlemen, the merchants, and the courtiers, to act for the King's advantage. The King might voluntarily tender such graces and modifications of his prerogative as might with smallest injury be conceded, in order to save the more important parts unimpaired.[2] Besides Nevill, who had offered to undertake, on behalf of the future House of Commons, that if the King would concede the chief points in dispute the House would not be niggardly in granting supplies, there were some others who appear to have engaged, not only to facilitate the king's dealings with the House, but to influence the elections. The project of these men, who, in

[1] See the Memorial in Gardiner, Hist. Eng. (1603–1616), App. V.
[2] Cott. MS. Titus F. iv., ff. 328, 330, 332, cited by Gardiner.

the phraseology of the day, were termed the 'Undertakers,' soon leaked out, and excited much indignation throughout the country. The belief that a general attempt was being made to pack the Parliament caused the Government candidates to be rejected on all sides. Of the members returned to Westminster, three hundred, or nearly two-thirds of the whole assembly, were elected for the first time, the constituencies having evidently looked out for men who represented the determined spirit of the nation even more strongly than the members of the late Parliament had done.[1]

Second Parliament. 1614, April 5.

Impositions denounced.

Parliament met on April 5th, 1614. In the King's Speech certain concessions were offered, but of slight Constitutional importance. The Commons were not to be satisfied with these small instalments of justice. They went at once to the old grievance of Impositions. A unanimous vote was passed against the King's right of imposing taxes without the consent of Parliament; and a Conference on the subject was demanded of the Lords. The Lords requested the advice of the Judges on the legal point; but this was adroitly refused by the mouth of Chief Justice Coke, on the ground that the question might come before them judicially. The Lords, finally, declined the conference; but in the course of their debate an incident occurred which caused much excitement in the Lower House. Neile, Bishop of Lichfield, a sycophantic seeker after power and place, indulged in very abusive language towards the Commons. The Lower House immediately demanded satisfaction from the Lords. The Bishop, when called upon to explain his words, protested 'with many tears' that he had been misconstrued and never meant to speak any evil of the Commons. The Lords acquainted

Bishop Neile.

[1] Gardiner, Hist. Eng. ii. 147. 'Amongst those who were thus elected were two men who were to set their mark upon the history of their country. Sir Thomas Wentworth, a young man of twenty-one, and heir to a princely estate in Yorkshire, represented the great county of the north; John Pym, a Somersetshire country gentleman, nine years older than Wentworth, was sent to the House of Commons by the little borough of Calne.'—*Ibid.*

the Lower House with what had passed, but expressed an opinion that in future no member of their House ought to be called in question on the ground of common fame alone. The King now sent a message that unless the Commons proceeded forthwith to treat of supply, he should dissolve Parliament. But it was too late for intimidation. They declared that they would first proceed with the business of Impositions before taking supply into consideration. A few days later, on the 7th of June, James dissolved the Parliament, which, from the circumstance of its not having passed a single Bill, was nicknamed 'the Addled Parliament.'[1] It had sat a little more than two months.

The second or *Addled Parliament* dissolved, 7 June, 1614.

This sudden dissolution of Parliament was not sufficient to appease the exasperation of James. Four members who had distinguished themselves by the warmth of their language, Wentworth,[2] Hoskins, Christopher Nevill (a younger son of Lord Abergavenny), and Sir Walter Chute, were sent to the Tower. Sir Edwin Sandys and four other members were ordered, at the same time, not to leave London without permission, while Sir John Savile, Sir Roger Owen, Sir Edward Phelips, and Nicholas Hyde, were punished by dismissal from the Commission of the Peace.

Members sent to the Tower.

This intemperate action of James committed him still more deeply to the conflict with the House of Commons. His position towards that assembly had, in fact, already become untenable. 'No political truth,' observes Mr. Gar-

Importance of the step taken by James.

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[1] ['The courtiers,' says Green, *Hist. Eng. People*, iii. 90, 'mocked at the "Addled Parliament," but a statesman would have learned much from the anger and excitement that ran through its stormy debates.'—ED.]

[2] Thomas Wentworth, a Puritan lawyer and member for Oxford. He was a son of the Peter Wentworth who suffered for his boldness of speech under Elizabeth, and had himself already given offence, in the last Parliament, by the freedom of his language. He is to be distinguished from *Sir* Thomas Wentworth, member for Yorkshire, who was returned to Parliament in 1614 for the first time. Of the four members sent to the Tower, Wentworth was released on the 29th June, Nevill on the 10th of July, and Chute on the 2nd October. Hoskins, who, in declaiming against the Scottish favourites, had gone so far as to hint at the possibility of an imitation of the Sicilian Vespers, was detained in prison for a twelvemonth.—Privy Council Register, cited by Gardiner, Hist. Eng. [1603-1616, i 165, *n.*—ED.].

diner, 'has been more completely demonstrated by experience than that which declares the impossibility of the co-existence, for any long time, of an hereditary sovereign and a representative legislature, wherever no right of control is recognised as existing either in the legislature itself, or in the nation which it represents. James might choose one of two courses; he might attempt to deprive the Parliament of its representative character, by refusing to allow it to express the wishes of the nation, or he might give it a control over the executive government. No middle way was possible. Supported by his Council, by his own ideas of his rights as a king, and by a few precedents from the reign of Elizabeth, he chose the former alternative. To this step of his there could be but one reply. Misgovernment had been met by the Commons with refusal of supplies. Imprisonment of their members, it might safely be predicted, would be answered, whenever they met again, by impeachment of the ministers of the Crown.'[1]

Six years of arbitrary government, [1614–20].

During the next six years James pursued a career of arbitrary government unchecked by the existence of Parliament. To supply the wants of his Treasury recourse was again had to the old expedients of forced loans, monopolies, heavy fines, and the rigorous exaction of the old feudal payments. At the time of the dissolution some of the Bishops offered the King a contribution to help him out of his difficulties. In a few days their example was followed by the principal nobility and officers of the Court; and a resolution was then taken to call upon all England for a general Benevolence. Letters were written by the Council to the sheriffs and magistrates in each county and borough calling upon them to collect and send in contributions from all persons of ability.[2] Although care was taken to represent these payments in the character of voluntary contributions, the Council in their letters did not hesitate to give very strong hints that it would not be well with

A general Benevolence.

[1] Gardiner, Hist. Eng. [1603–1616] ii. 166.
[2] See Hamilton, Quarter Sessions from Elizabeth to Anne, *passim*.

those who refused to pay. It was significant that the Judges of assize were specially charged with the task of recommending payment,[1] a mischievous resuscitation of the blended judicial and fiscal functions of the ancient Justices itinerant. But despite of all the exertions of the Court only a very small sum was with much difficulty and pressure obtained. The Bishops, courtiers, and City of London had contributed £23,500 previously to the general appeal. From the general appeal itself, extending over nearly three years, the total sum obtained from the people of England was no more than £42,600.[2] In several counties the sheriffs and magistrates sent up united protests against the demand, appealing to the Act of 1 Richard III. c. 2, against Benevolences, and expressing their unwillingness to injure their posterity by establishing a bad precedent.[3]

Protests against it.

Mr. Oliver St. John, on being applied to by the Mayor of Marlborough for a contribution, replied in a letter in which he maintained that all such contributions were contrary to Magna Charta and other statutes, including the well-known Act of Richard III., and that it was improper for private individuals to oppose their judgment to that of the Commons in Parliament who had refused to grant any supply. He concluded, somewhat intemperately, by charging the King with breaking the Coronation oath, and declaring his belief that all who paid the Benevolence were supporting their sovereign in perjury. This letter having come to the knowledge of the Council, St. John was sent for to London, committed to the Tower, and sentenced by the Star Chamber to pay a fine of £5,000, and to be imprisoned during the King's pleasure. The fine was afterwards remitted, but he was not set at liberty for some time.

Imprisonment of Mr. Oliver St. John.

At this time the King and Council were also engaged in investigating another affair, which was probably clothed with an importance which it did not possess in consequence

Prosecution of Peacham, 1615.

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[1] Gardiner, Hist. Eng. [1603–1616] ii. 172.
[2] *Ibid.*
[3] Privy Council Register, cited by Gardiner, [*Ibid.*] App. VI.

of the excited feelings roused by the levy of the Benevolence. Edmund Peacham, rector of Hinton St. George, Somersetshire, (one of the counties which had taken the lead in remonstrating against the Benevolence), had recently been prosecuted in the High Commission Court for a libel on his Bishop and on the Consistory Court, and was sentenced to be deprived of his orders. While the prosecution was pending, his house was searched, apparently for papers connected with the alleged libel, and the officials happened to alight upon a manuscript treatise in the form of a sermon, together with some loose sheets, containing, in very offensive language, such an attack upon the personal conduct of the King and the actions of his Ministers, as would undoubtedly, if published, have amounted to a seditious libel. These writings were submitted to the Council, who, there is little doubt (though there is no direct evidence on the point), jumped to the conclusion that Peacham's sermon, instead of being an isolated piece of Puritanic intemperance, had been prepared in connection with an organised conspiracy of the Somersetshire gentry.[1] Peacham was put to the rack and examined, as it is expressed by Secretary Winwood, 'before torture, in torture, between torture, and after torture,' in the vain expectation that he would reveal a plot which had never existed. No conspiracy or shadow of a conspiracy having been detected, the King and his Council determined to proceed directly against the prisoner, not for a seditious libel, but for treason, under the statute of Edward III., in compassing the King's death. The only semblance of evidence of an overt act of treason was the manuscript sermon, never preached, nor necessarily intended to be preached. James directed the Attorney-General, Bacon, to confer with the

[1] In consequence of the resistance to the Benevolence shown by the county of Somerset, three of its magistrates had recently been summoned before the Council to receive a lecture on the impropriety of their conduct. Of these, one, Sir Maurice Berkeley, was known to have been in communication with Peacham at the time of the last Parliament, and another, John Paulet, was his immediate neighbour, and had presented him with the living of Hinton.—Gardiner, Hist. Eng. [1603–1616] ii. 181.

Judges of the King's Bench separately, in order to ascertain, and probably to influence, their opinion. Chief Justice Coke objected, (so Bacon reported to the King), that 'such particular, and as he called it, auricular taking of opinions was not according to the custom of the realm.'[1] The three Puisne Judges made no difficulty in giving an opinion favourable to the Crown; and Coke, finding himself unsupported by his brethren in his resistance to separate and private consultation of the Judges, at length consented to give a written opinion, which proved however by no means satisfactory. Of the two grounds for questioning the treasonable nature of Peacham's writing, first, that it had never been published, secondly, that even if it had been published, it did not amount to treason, Coke appears to have passed over the first, but asserted boldly that no mere declaration of the king's unworthiness to govern amounted to treason.[2] Peacham was brought to trial at the Taunton Assizes, convicted, and sentenced to death. He was not, however, executed, but died in gaol about seven months afterwards.

Collision between the King and Chief Justice Coke.

For some time there had been indications of an impending collision between the King and the Chief Justice of the King's Bench. Now that James was at open war with the representatives of the nation, and was determined to govern as long as possible without the co-operation of a Parliament, the only power in the State which he had to fear was the Judicial power. It was impossible to prevent cases involving questions of the utmost Constitutional importance from being submitted, as they arose from time to time, to the decision of the Judges of the land. They were the authorised exponents of the existing law, and thus pos-

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[1] Bacon's Works (ed. Montagu), xii. 124. Coke's objection was not to the consultation of the Judges by the King, but to their being consulted separately. At a later time he expressed himself against the propriety of the Law-Officers consulting the Judges at all (3 Inst. 29), and quoted a conclusive precedent in his favour from the Year Books; but this point was never raised on the present occasion.—Gardiner, Hist. Eng. [1603–1616] ii. 186.

[2] 'Innovations of Sir E. Coke,' Bacon's Works (ed. Montagu), vii. 404.

sessed the power, if so minded, effectually to check the encroachments of the Royal prerogative.

Prior to Coke's accession to the bench, the Judges had shown themselves, on the whole, sufficiently favourable to the prerogative. No reasons could be more satisfactory to the Crown than those upon which the Judges had founded their decisions in the celebrated cases of the *Post-nati* and of the Impositions.[1] But Coke early developed upon the bench a sturdy personal independence, and a determination to appeal on all occasions to the supremacy of the Law, which frequently brought him into conflict with the King and the Ecclesiastical and courtly supporters of the King's absolute power.[2] The claim, pertinaciously asserted by the King and his Council, to interfere with the opinions of the Judges in every case in which the rights of the Crown were in the slightest degree involved, was met by Coke with as pertinacious a denial.

The *Case of Commendams.* 1616.

Matters were brought to a crisis, in 1616, by the proceedings in what is known as the 'Case of Commendams.' During the time that Bishop Neile held the See of Lichfield, he had received from the King the grant of a living to be held '*in commendam*,' that is, along with his bishopric. Two persons named Colt and Glover brought an action against the Bishop on the ground that the presentation was theirs, and not the King's, and they further pleaded that, owing to certain legal objections, the King's grant was invalid in itself. On account of its great importance, the case was adjourned into the Exchequer Chamber before all the twelve Judges. The King, hearing that his prerogative was likely to be called in question, deputed Bishop Bilson to sit in court, in his name, whilst the case was being argued, and to report on the language employed. Bilson reported that the counsel for the plaintiffs, besides

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[1] *Supra*, pp. 518, *n.* 2, 519.

[2] See, in particular, the case of *Brownlow* v. *Michell*, and Bacon's argument on the writ *De Rege Inconsulto* (Works, vii. 683), and the case of *Glanville and Courtney*, which gave rise to Coke's quarrel with the Chancery (Cro. Jac.). The facts are concisely stated in Gardiner, Hist. Eng. (1603–1616), ii. 266–271.

arguing the special points of the case, had disputed the King's general prerogative to grant a commendam. Hereupon James directed the Attorney General Bacon to write to the Chief Justice, ordering him and the rest of the Judges not to proceed to judgment until they had spoken with the King. Coke shortly replied that if it was wished that the other Judges should receive the information just given to him, Bacon had better write to them himself. This was done; but the next day, the Judges, as if nothing had happened, proceeded with their arguments. On the day following, they despatched a letter to the King, signed by all the twelve, informing his Majesty that, as they were unanimously of opinion that the Attorney General's letter was contrary to law, they felt bound by their oaths to pay no attention to it, and had accordingly proceeded with the case on the appointed day.

The King, who was then at Newmarket, returned answer that the present case was one which concerned not merely the interests of private persons, but in which he himself was to all intents and purposes a party; that delay was necessary in order that he might lay before them his own case, and that the oath not to delay justice was not meant to prejudice the king's prerogative; and concluded by commanding them, of his absolute power and authority royal, not to proceed further in the cause till they should hear his pleasure from his own mouth. On his return to London, the twelve Judges were summoned before the King and his Council. James personally expatiated upon their misdemeanours both in substance and in the form of their letter certifying him merely what they had done, instead of submitting to his judgment what they should do. He told them it was their duty to check those advocates who presumed to argue against his prerogative; that the popular lawyers were the men who, ever since his accession, had trodden on his prerogative in all Parliaments;[1] that

Independence of the Bar assailed.

[1] James was careful to do what he could to repress the independence of the Bar. In 1607, Nicholas Fuller, a bencher of Gray's Inn (who had sat in

his prerogative was double, the one ordinary, having relation to private interests, and which might be and was every day disputed in Westminster Hall; the other of a higher nature, referring to his supreme and imperial power and sovereignty, which ought not to be disputed or handled in vulgar argument; but that of late the courts of common law had grown so vast and transcendent, as both to meddle with the king's prerogative and encroach upon all other courts of justice. As soon as he had concluded, all the Judges fell upon their knees and asked pardon for their error. But Coke, though he joined in demanding pardon, entered on a justification of their conduct, reiterating his opinion that the postponement required by the King was in fact a real delay of justice, contrary to the law and their oaths. At the desire of James, the Lord Chancellor Ellesmere and the Attorney General Bacon then delivered their opinions, which were directly opposed to that of the Chief Justice. The following question was then put to the Judges, one by one; 'Whether, if at any time in a case depending before the judges, his Majesty conceived it to concern him either in power or profit, and thereupon required to consult with them, and that they should stay proceedings in the meantime, they ought not to stay accordingly?' All, except Coke, fearful of offending the

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Cases of Nicholas Fuller,

James's first Parliament, and was returned for the City of London in 1614), was employed by two Puritans, Ladd and Maunsell, committed by the High Commission Court for refusing the oath *ex officio*, to move for their *habeas corpus*. This he did on the ground that the Commissioners had no power to fine or imprison under the Statute of Elizabeth (1 Eliz. c. 1). Although this interpretation was not accepted by the Judges at the time, the language of the statute was such as to admit of argument. On the ground that he had slandered the King's authority by questioning the power of the Commission, Fuller was himself summoned before the High Commission Court, fined 200*l.*, and committed to prison.

and James Whitelocke.

In 1613, James Whitelocke, a barrister who had been brought into notice in James's first Parliament by his great speech on Impositions, was summoned before the Star Chamber on the charge of having given a private opinion to his client that a Commission issued by the King to inquire into the state of the navy was illegal, on account of certain directions contained in it, as to punishing offenders, which Whitelocke considered contrary to the well-known clause of Magna Charta. He was committed to the Fleet, but on making humble submission, was set at liberty.—*Fuller's Case*, 12 Rep. 41; Whitelocke's *Liber Famelicus*, 33–40, 113–118; Gardiner, Hist. Eng. [1603–1616] i. 443; ii. 109.

King, to whom they owed all their future prospects of professional advancement, promised to act in future according to the Royal wishes. But from Coke no other answer could be extracted than that, whenever such a case should come before him, he would do what was fitting for a Judge to do. The noble conduct of the Chief Justice on this occasion has deservedly obtained for him the admiration of posterity.[1] Rather than prostitute the independence of the Judicial bench to the arbitrary interference of the King, he showed himself ready to sacrifice, for conscience sake, the high position to which his own merits had raised him. Within a few weeks he was censured by the Council and suspended from his office, and not long afterwards, in Nov. 1616, received notice that he had ceased to be Chief Justice.[2]

Coke is dismissed from the Chief Justiceship.

'With the disgrace of Coke,' observes Mr. Gardiner, 'the period of transition between the history of the Tudors and the history of the Stuarts comes to an end. It is a great historical landmark. Up to this time James had been busy in acquiring the powers which were afterwards to be used with such fatal results to himself and to his son. By the deprivation of Coke he obtained at a blow all that he had been seeking by more devious courses. The common law judges now held their offices practically, as well as theoretically, at the good pleasure of the sovereign. From henceforward the prerogative was safe from attack in the courts of law. From henceforth, too, it stood on its own merits, and could no longer expect to obtain that moral support which it had hitherto received from the decisions pro-

His disgrace an historical landmark.

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[1] [Green, *Hist. Eng. People*, iii. 94, while admitting that when 'driven to answer' the King, Coke 'answered well,' gives what seems a very imperfect view of his character, describing him as a 'narrow-minded and bitter-tempered man, but of the highest eminence as a lawyer, and with a reverence for the law that over-rode every other instinct.' But he shews both that James's 'resolve to tamper with the course of justice' stirred a deeper resentment among Englishmen than any other of James's acts, and also that Coke's firmness in refusing to 'consult' with the King, which, 'as James interpreted the phrase, simply meant to obey the King's bidding as to what the judgment of a court should be,' was 'justified by what immediately followed.'—ED.]

[2] Hallam, Const. Hist. i. 346–349; Gardiner, Hist. Eng. [1603–1616] ii. 272–283.

nounced from the bench by judges who were, comparatively at least with those who held office subsequently to Coke's disgrace, independent of the favours and the anger of the Crown.'[1]

Foreign policy of James.

The Foreign policy of James was scarcely, if at all, less irritating to his people than his domestic misgovernment. On coming to the throne he immediately declared for peace with Spain, regardless of the wishes of the great body of Englishmen who, looking with twofold indignation on the Spanish power as the great supporter of Popery and tyranny, and feeling bound in honour not to desert their old allies the Dutch in their gallant and now at length hopeful struggle for independence, were eager to carry on the war.[2] James, however, was not only by nature averse from all war, but his notions of the Divine Right of kings caused him to regard the Dutch war in particular as a contest of rebels against their lawful sovereign, and therefore undeserving of any assistance from him. There were indeed many circumstances in the condition of England at the death of Elizabeth which rendered an honourable peace with Spain highly desirable; but not content with peace, James must needs run counter to the whole current of national feeling and prejudice, by setting his heart upon a marriage between his son and the Infanta. The unfeeling execution of Sir Walter Raleigh (29 Oct. 1618), under a sentence of treason passed fifteen years previously, on evidence which was generally considered to be inconclusive, was regarded by the nation as a mean truckling to the revengeful demands of the Court of Madrid; and the policy of alliance with Spain became still more odious after the

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[1] Hist. Eng. (1603–1616), ii. 284, 326.

[2] [Gardiner, *Hist. Eng.* 1603–42, i. 102–5, only speaks of a 'large party' in England which was 'desirous to fight the quarrel out with Spain.' On the other hand he says that Cecil knew that 'England could not bear many more years of war,' and he thinks that Barneveld, when he came over to congratulate James on his accession, 'seems to have made an impression upon the susceptible mind of James, and was, perhaps, the first who induced him to doubt the truth of the sweeping condemnations which he had been accustomed to pass on the cause of the Dutch.'—ED.]

outbreak of the war in Germany, in which the King's son-in-law, Frederick, Elector Palatine, was driven out of his hereditary dominions by the Emperor. Despite his pacific temper, James was roused to attempt the restoration of his son-in-law, but while he was anxious to effect his object through the friendly mediation of Spain, the nation was clamorous to support the Protestant interest in Germany by force of arms. In this state of affairs the Ministers advised the King to take advantage of the war enthusiasm to summon a Parliament, and James reluctantly gave his consent.

Third Parliament. Session I. 1620–1. Jan. 30–June 4.

James's third Parliament met on the 30th January, 1620—1, and was opened with a conciliatory speech from the Throne. The Commons made some complaints of the imprisonment of four of their members, at the close of the Parliament of 1614, for words spoken in the House; but the matter was allowed to drop on certain explanations being given by Mr. Secretary Calvert, and an assurance from the King that he would faithfully maintain the privilege of freedom of speech demanded by the House. Two subsidies were then voted.

Revival of Impeachments.

On the motion of the ex-Chief Justice, Sir Edward Coke, a Committee of inquiry into grievances had been early appointed. The first abuse to which their attention was directed was that of Monopolies, and this led to the revival of the ancient right of Parliamentary Impeachment —the solemn accusation of an individual by the Commons at the bar of the Lords—which had lain dormant since the impeachment of the Duke of Suffolk in 1449.[1] Under the

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[1] In 1534 the Commons had complained to the Lords of the conduct of Stokesley, Bishop of London, and called upon him to make answer. But the Lords declared that it was unbecoming of any Lord of Parliament to make answer in that place; and the proceeding has not generally been regarded as a case of impeachment.—Lords' Journals, i. 71; Hallam, Const. Hist. i. 357 *n.* The proceedings against Wolsey in 1529 have sometimes been termed an 'impeachment,' but inaccurately. Articles against him were first presented to the Upper House and then sent down to the Commons, who rejected them, chiefly through the eloquent defence of his patron made by Thomas Cromwell.—Lingard, vi. 160.

Tudors impeachments had fallen into disuse, partly through the subservience of the Commons, and partly through the preference of those sovereigns for Bills of Attainder, or of pains and penalties. Moreover, the power wielded by the Crown through the Star Chamber enabled it to inflict punishment for many State offences without resorting to the assistance of Parliament. With the revival of the spirit of liberty in the reign of James I., the practice of impeachment revived also, and was energetically used by the Commons in the interest alike of public justice and of popular power.

Impeachment of Mompesson and Mitchell, 1621.

In the session of 1621, the Commons impeached Sir Giles Mompesson and Sir Francis Mitchell who, as patentees for the exclusive manufacture of gold and silver thread, for the licensing of ale-houses, and for the inspection of inns and hostelries, had been guilty of gross fraud, violence, and oppression. The Lords passed judgment on both, condemning them to be imprisoned, fined, and degraded from the honour of knighthood.[1]

Impeachment of Lord Chancellor Bacon. 1621.

The impeachments of Mompesson and Mitchell were followed up by others against Sir John Bennet, Judge of the Prerogative Court of Canterbury, for corruption in his office; and Field, Bishop of Llandaff, for brocage of Judicial bribery. As yet the Commons had only attacked private persons; a much more important step was the impeachment of Lord Chancellor Bacon, which revived the right of impeaching the King's Ministers. He was found guilty by the Lords of receiving bribes from the suitors of his Court, and condemned to pay a fine of £40,000, to be imprisoned in the Tower during the king's pleasure, to be for ever incapable of any office, place, or employment, and never again to sit in Parliament.[2] The Constitutional right, revived by the proceedings against Bacon, was confirmed

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[1] Mompesson had escaped beyond sea, but Mitchell suffered his punishment.

[2] It is to the credit of James that recognising the transcendent genius of the great philosopher, he mercifully released him from the Tower after a short confinement, remitted the fine and the other parts of the sentence, and conferred upon him a pension of 1800*l.*

and completely re-established by the impeachment, in 1624, of Lionel Cranfield, Earl of Middlesex, Lord Treasurer of England, for bribery and other misdemeanours. On his trial he maintained his innocence with much spirit, and bitterly complained of the law which denied to him the benefit of counsel's assistance. He was unanimously convicted, but his remonstrance on the harshness of the law induced the Lords to make an order that in future cases of impeachment the accused should be furnished with copies of the depositions for and against him, and that on demand he should be allowed the aid of counsel.[1]

Impeachment of [Lord Treasurer] Middlesex. 1624.

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[1] Lords' Journal, 307–383, 418.

IMPEACHMENTS.—From the year 1621, when Sir Giles Mompesson and Lord Bacon were impeached, down to the Revolution in 1688, there were about forty cases of impeachment; under William III., Queen Anne, and George I., fifteen; and the reign of George II. was marked by one only, that of Lord Lovat, impeached in 1746 for high treason. [May, *Parl. Prac.*, 9th ed., p. 58.]

Subsequent cases of Impeachment.

The principal cases of Constitutional importance since the impeachment of the Earl of Middlesex in 1624, are the following:—

George Villiers, Duke of Buckingham.—Impeached by the Commons before the Lords on thirteen charges, of which the most important were that (1) he had neglected to guard the high seas; (2) had lent a squadron of English ships to be employed against the Huguenots; and (3) had purchased for money and monopolised in his own person several of the highest offices of state. Sir Dudley Digges, Sir John Eliot, and six other members of the Commons managed the accusation before the Lords. Buckingham delivered in his answer, and the Commons were preparing to reply, when Charles I. dissolved Parliament. In 1628 the Commons presented a remonstrance to the King, ascribing the evils which afflicted the kingdom to the excessive power exercised and abused by Buckingham, and prayed for his removal from office and from about the King's person. Shortly afterwards Charles prorogued Parliament, and during the recess Buckingham was assassinated by Felton.

Buckingham. 1626.

[See *post*, *App.*—ED.]

Dr. Roger Mainwaring.—Impeached by the Commons for three political sermons (two preached before the King,) afterwards published under the title of 'Religion and Allegiance.' He maintained that 'Parliaments were not ordained to contribute any right to the King, but for the more equal imposing and more easy exacting of that which unto kings doth appertain by natural and original law and justice, as their proper inheritance annexed to their imperial crowns from their birth;' and that those who refused to pay taxes and loans imposed by the king's royal command, without consent of Parliament, 'did offend against the law of God and the king's supreme authority, and became guilty of impiety, disloyalty, and rebellion.' He was condemned by the Lords to imprisonment during the pleasure of the House, to pay a fine of 1000*l.*, to be suspended for three years from the ministry, and to be incapable of holding any office, ecclesiastical or civil. Yet Charles almost immediately pardoned him, gave him an additional rectory, and some years afterwards made him Bishop of St. David's.

Mainwaring. 1628.

Thomas Wentworth, Earl of Strafford.—Impeached by the Commons of high treason. Of the twenty-eight articles exhibited against him, having reference

Strafford. 1640.

Not content with reasserting their ancient right of impeachment, the Commons, in the session of 1621, were

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to his conduct as President of the Council of the North, as Lieutenant of Ireland, as a Privy Councillor, and as Commander of the King's army in England, one only, the 15th, charging him with levying money by his own authority and quartering troops on the people of Ireland, in order to compel them to pay, could be fairly construed as a substantive treason—that of 'levying war against the King'—within the Statute of Edward III. The Commons attempted to set up a principle of *cumulative* treason; but even if the evidence as to all the charges had been legally sufficient, it appeared extremely doubtful whether the crime of treason could be established. Firmly persuaded that Strafford was an enemy to his country, and, if not technically, yet to all intents and purposes, a traitor, some of the leaders of the Commons resolved to avail themselves of one of the worst precedents of the Tudor times, and to proceed by Bill of Attainder. Pym and Hampden opposed this course, but were outvoted: Falkland and Hyde, who shortly afterwards became the leaders of the Royalist party, eagerly supported the attainder. (See Forster's Historical and Biographical Essays, i. 252.) Fifty-nine members of the Commons voted against the Bill when it was introduced in the Lower House, and were in consequence placarded in the streets as 'Straffordians, who, to save a traitor, would betray their country.' The Lords requested the opinion of the Judges whether some of the articles of accusation amounted to treason, and received a somewhat indecisively expressed answer, which, without distinctly stating that the prisoner was guilty of treason, declared that 'they were of opinion, upon all which their lordships had voted to be proved, that the Earl of Strafford doth deserve to undergo the pains and forfeitures of high treason by law.' Apprehension of popular tumult prevented more than forty-five peers from attending at the passing of the Bill (May 7, 1641), and of these, nineteen voted against it. In the midst of violent anxiety and doubt, Charles I. weakly and ungenerously gave the Royal assent, thus sacrificing the man who had so faithfully served him, and whom he had promised that 'not a hair of his head should be touched.' 'The execution of Strafford,' as is remarked by Earl Russell, 'casts a stain upon all parties in the state. The House of Commons were instigated by passion; the House of Lords acted from fear; and Charles from some motive or other, which, at all events, was not the right one. The admission of the mob to overawe the deliberation of Parliament was a sure sign that law was about to be subverted.' (English Government and Constitution, p. 66.)

Laud. 1641.

Archbishop Laud.—Impeached of high treason in March, 1641, and sent to the Tower, where he remained until his death. In October, 1643, specific articles were exhibited against him, relating partly to Religious matters and partly to the violent proceedings in the Star Chamber and High Commission Court, in which, as a councillor, he had borne a very prominent part. The charges may be summed up under the three heads of endeavouring (1) to subvert the fundamental laws of the realm and introduce arbitrary government; (2) to subvert true religion and introduce Popery; and (3) to subvert the rights of Parliament. After a long trial and the examination of more than 150 witnesses, there appeared so little likelihood of obtaining a Judicial condemnation, that the Commons changed their impeachment into an Ordinance (or Bill) of Attainder. The Peers consulted the Judges, who answered 'that they could deliver no opinion in this case in point of law, because they could not deliver any opinion in point of treason but what was particularly expressed to be treason in the statute of 25 Edward III., and so referred it wholly to the judgment of this House.' (Lords' Journ. 17 Dec. 1644.) This was tantamount to a declaration that the charges contained no legal treason; but the Peers (twenty only were present) passed the Bill; and the Archbishop was beheaded on the 10th January, 1644–5.

Clarendon. 1667.

Edward Hyde, Earl of Clarendon, the Lord Chancellor and Chief Minister

hurried by their zeal against Popery and their enthusiasm for the Protestant Elector Palatine, into an act which was

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of Charles II. from the Restoration till his own fall.—Impeached on a 'general' charge of high treason. Of the seventeen articles against him, the most important were the first, the fourth, and the eleventh; viz., (1) 'That the Earl of Clarendon hath designed a standing army to be raised, and to govern the kingdom thereby, and advised the King to dissolve this present Parliament, to lay aside all thoughts of Parliaments for the future, to govern by a military power, and to maintain the same by free quarters and contributions.' (4) That he 'advised and procured divers of his Majesty's subjects to be imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to procure precedents for the imprisoning any other of his Majesty's subjects in like manner.' [This charge was undoubtedly true. The arbitrary proceedings of Lord Clarendon gave rise to an agitation which ultimately led to the enactment of the 'Habeas Corpus Act,' in 1679.] (11) That he had advised and effected the sale of Dunkirk (won by Oliver Cromwell from Spain), for a sum much below its value, to Louis XIV. of France.

The Lords, declining to follow the precedent of Strafford's case in favour of a 'general charge' of treason (which the Commons had endeavoured to get up by using the word 'traitorously' in their impeachment), refused to commit Clarendon to the Tower. He fled from justice. In his absence an Act was passed (19 & 20 Car. II. c. 2) commanding him to surrender for trial within a limited time, and in default of appearance banishing him for life, subjecting him to the penalties of high treason if he returned to England, and rendering him incapable of pardon, except by Act of Parliament. Illness prevented Clarendon from appearing within the prescribed time to take his trial, and he died an exile at Rouen in 1674.

Danby. 1679.

Thomas Osborne, Earl of Danby.—Impeached of high treason and other high crimes and misdemeanours. The principal charge against him was his having written a letter to Montagu, the English Minister at the Court of Versailles, empowering him, only five days after an act had been passed to raise supplies for carrying on the war with France, to make an offer of neutrality between France and Holland for the price of 6,000,000 livres.

The impeachment of Danby brought forward several points of great Constitutional importance. (1) The letter to Montagu had been most unwillingly written by Danby at the express command of King Charles II., who, to satisfy the scruples of his Minister, had even subjoined a postscript in his own handwriting—'This letter is writ by my order, C. R.' As the King's authority for the letter was undeniable, 'the Commons,' as Hallam has observed, 'in impeaching lord Danby, went a great way towards establishing the principle (recognised by the modern theory of the constitution) that *no minister can shelter himself behind the throne by pleading obedience to the orders of his sovereign*,' but is answerable 'for the justice, the honesty, the utility of all measures emanating from the crown, as well as for their legality'; thus rendering the executive administration 'subordinate, in all great matters of policy, to the . . . virtual control of the two houses of parliament.' (Const. Hist. ii. 408.)

(2) As in the previous instance of Lord Clarendon, a difference arose in this case between the Lords and Commons as to committing the accused to the Tower. The charges against Danby, as specified in the articles of impeachment, could not be brought within any reasonable interpretation of the statutes relating to treason, and manifestly amounted to no more than a misdemeanour. After an adjourned debate, the Lords refused to commit Danby to the Tower merely on the 'general charge' contained in the word 'traitorously,' and in the absence of a specific allegation of some overt act of treason. Parliament was shortly afterwards prorogued and then dissolved; but the next House of Commons revived the impeachment, and the Lords then, of their own motion,

at once an invasion of the Judicial rights of the Lords, and a piece of gross and cruel injustice. It came to the know-

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ordered the Usher of the Black Rod to take the accused into custody. Although the Lords thus receded from the position which they had originally taken up, their opposition in this case may be said to have *checked the practice of general impeachments.*

(3) Another point raised in this case was the *right of pleading the King's pardon in bar of a Parliamentary impeachment.* On being called upon to give in his written answer to the charges of the Commons, Danby pleaded a pardon, secretly obtained from the King, in discharge of all the offences of which he was accused. The Commons alleged 'that there was no precedent that ever any pardon was granted to any person impeached by the Commons of high treason, or other high crimes, *depending the impeachment;*' and resolved 'that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the Commons of England.' (Com. Journ. 28 April and 5 May, 1679.) The question was not settled on this occasion, as Parliament was prorogued and the impeachment not afterwards revived. On both legal and political grounds the Commons would seem to have been right in their contention. Although the King's prerogative to grant a pardon, even before trial, was undoubted in all ordinary criminal proceedings by indictment at the King's suit, it was equally undoubted that in any 'appeal' or prosecution for felony, not at the suit of the King, but of the injured party or his next of blood, the King had no power to remit the capital sentence. (See 'Appeal,' *supra*, p. 132.) If the King could not deprive a private individual of his remedy at law, much less could he stop an impeachment at the suit of the whole Commons of England. And on political grounds it was clear that if the plea of the accused were admitted, there would be an end to the pretended responsibility of the Ministers of the Crown, who by the intervention of prerogative might be screened from the inquiry and justice of Parliament. Directly after the Revolution the Commons again voted that 'a pardon is not pleadable in bar of an impeachment' (Com. Journ. 6 June, 1689); but the question was not finally decided till the Act of Settlement (12 & 13 Will. III. c. 2) declared 'that no pardon under the Great Seal of England shall be *pleadable* to an impeachment by the Commons in Parliament.' The right of the Crown to reprieve or pardon after sentence, remains, however, unaffected. James I. had remitted the whole sentence on Lord Chancellor Bacon; and after the impeachment and attainder of the six Scottish Lords concerned in the Rebellion of 1715, three of them received the King's pardon. Indirectly, the Commons possess the power of pardoning by refusing to demand judgment after the Lords have found the accused guilty; for no judgment can be pronounced by the Lords till after it has been demanded by the Commons. See May, Parl. Prac. [9th edit. p. 739].

(4) The *right of the Bishops to sit and vote on the trial of peers in capital cases* was another question raised by the impeachment of Lord Danby. It was admitted that by ancient custom—originating in a claim of privilege by the Church—the Bishops never voted on judgment of death. But the Commons contended that as the final judgment often depends upon the preliminary proceedings—as in this case upon the validity of Danby's plea of a pardon in bar—the Bishops ought not to vote on such preliminary proceedings. The Lords, however, passed a resolution, which has ever since been adhered to, 'that the Lords Spiritual have a right to stay and sit in court in capital cases till the court proceeds to the vote of guilty or not guilty.' This is in conformity with the 11th chapter of the Constitutions of Clarendon (11th Hen. II.) which expressly required the Bishops to be present on trials, but, in deference to the Canon Law, excused them from voting when it came to a question of life or limb, ('episcopi sicut caeteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem,' *supra*, p. 100). The limited exclusion of the Bishops applies only to purely judicial proceedings.

ledge of the House that Edward Floyd, a Roman Catholic barrister, then a prisoner in the Fleet, had expressed his

Violent proceedings against Floyd.

They are fully entitled to vote at every stage of a Bill of Attainder, which, though judicial in substance, is in form a legislative act—even though it affect the life of the person attainted. In the attainder of Sir John Fenwick, in 1696, the Bishops voted in all the proceedings, including the final question for the passing of the Bill.

(5) Another point raised for the first time on the trial of Lord Danby, was, *whether an impeachment abated on the prorogation or dissolution of Parliament?* In 1673 a Committee of the Lords, appointed to inquire whether 'appeals, either by writ of error or petition, from the proceedings of any other court, being depending and not determined in one session of Parliament, continue *in statu quo* until the next session,' had reported in the affirmative, and their report had received the confirmation of the House. In March, 1678–9, a similar decision was come to by the Lords with regard to the effect of a dissolution of Parliament, as distinguished from a prorogation from session to session. It was also resolved (with special reference to Lord Danby's case) 'that the dissolution of the last Parliament did not alter the state of the impeachments brought up by the Commons in that Parliament.' (Lords' Journ. March 18th, 19th, 1678–9.) This continued to be the law of Parliament until 1685, when, in order to secure the escape of the 'popish lords' then under impeachment, the previous resolution was reversed and annulled. (Lords' Journ. May 22nd, 1685.) The lingering impeachment of Lord Danby, which had been continued by the first decision, was put an end to by the last. He had suffered five years' imprisonment in the Tower, not being admitted to bail until 1684. He subsequently took an active part in public affairs under William III., by whom he was created Marquis of Carmarthen and, in 1694, Duke of Leeds. In 1695 he was again impeached by the Commons on a charge of corruption; but the session being suddenly prorogued, no further proceedings were taken. He died in 1712. The question of abatement was not finally settled until 1791, when a dissolution having intervened during the impeachment of Warren Hastings, it became necessary for Parliament to review the precedents of former impeachments and to pass its judgment on the contradictory decisions of the Lords. After full discussion, it was voted in both houses, by large majorities, that by the law and custom of Parliament an impeachment pending in the House of Lords continues *in statu quo*, from one session and from one Parliament to another, until a judgment shall have been given.

Fitzharris, 1681.

Edward Fitzharris.—Impeached by the Commons of high treason. Their real object was to elicit disclosures of a pretended 'popish plot,' and so aid the progress of the Exclusion Bill against the Duke of York. In order to prevent the Commons from interfering in the prosecution, Charles II. had already instructed the attorney-general to proceed against Fitzharris in the King's Bench for a treasonable libel. The attempt of the Commons to take the prosecution out of the hands of the Court party brought into discussion an important point of Constitutional law—viz., *whether a commoner could be impeached for a capital offence.* The Lords, in the interest of the Court, voted that 'Fitzharris should be proceeded with according to the course of common law, and not by way of impeachment.' The grounds of their decision were not stated; but the fact of his being a commoner appears to have been mainly relied on. They were supported by a supposed authority in the case of Sir Simon de Beresford in the 4th Edward III. Sir Simon, however, was not impeached by the Commons, but charged before the Lords, *at the suit of the Crown*, of participation in the treason of Roger Mortimer. After giving judgment against him, the Lords made a declaration (which, as being made 'with the assent of the King, in full Parliament,' has been regarded by some as a statute) 'that the aforesaid judgment be not drawn into example or consequence in time to come, whereby the said peers may be charged hereafter to judge other than their peers, contrary

satisfaction that 'goodman Palsgrave and goodwife Palsgrave' (the Palatine and his consort) had been driven from

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to the law of the land.' (Rot. Parl. ii. 53, 54.) Even if this declaration amounted to a statute, which was doubtful, it clearly applied to cases similar to that of De Beresford, and not to an impeachment at the suit of the Commons. In subsequent cases the Lords had violated not only their own declaration, but also Magna Charta and the Common law, by trying commoners for capital offences at the suit of the Crown. But an impeachment by the Commons is a proceeding of a totally distinct character. The reign of Richard II. afforded several precedents of the impeachment of commoners; and the right had been exercised, without question, so recently as the time of Charles I. The Commons met the decision of the Lords by voting it 'a denial of justice, a violation of the constitution of Parliament, and an obstruction to the further discovery of the popish plot, and that if any inferior court should proceed to the trial of Fitzharris, it would be guilty of a high breach of the privileges of the House of Commons.' The King shortly afterwards dissolved Parliament, and the prosecution of Fitzharris by indictment in the King's Bench was proceeded with. He pleaded in abatement that an impeachment was then pending against him for the same offence, but the plea was disallowed, and he was found guilty and executed. (8 Howell's St. Tr. 326.)

The unconstitutional theory of the Lords put forward in the isolated case of Fitzharris has been superseded by a later decision. After the Revolution, in 1689, Sir Adam Blair and four other commoners were impeached of high treason in having published a Proclamation of James II. A Committee was appointed to search for precedents; and after full deliberation, and rejecting a motion requiring the opinion of the Judges, the Lords come to a resolution to proceed on the impeachments. Lords' Journ. xiv. 260; May, Parl. Practice [9th ed. 683].

Portland, Orford, Halifax, and Somers, 1701.

William Bentinck, Earl of Portland; Edward Russell, Earl of Orford; Charles Montagu, Earl of Halifax; and *John, Lord Somers*, four Whig peers impeached of high treason by a Tory House of Commons, for their share in promoting the Spanish Partition Treaties in 1700, and for other alleged illegal practices. The two Houses quarrelled as to the time and mode of the trial; and as the Commons refused to appear on the day appointed to bring forward their evidence, the impeached Ministers were acquitted. (14 St. Tr. 233.) There was probably some foundation for several of the minor charges, but few have pretended to justify the impeachments, which, as Hallam observes, have generally been regarded as 'a disgraceful instance of party spirit.'

Dr. Sacheverell, 1710.

Henry Sacheverell, rector of St. Saviour's, Southwark, impeached by the Commons for two sermons preached, the one at Derby, the other at St. Paul's, in which he inculcated the doctrine of unlimited passive obedience. A prosecution characterised by Hallam (Const. Hist. iii. 204) as 'of high importance in a constitutional light, and not only the most authentic exposition, but the most authoritative ratification, of the principles upon which the Revolution is to be defended.' 'The managers appointed by the House of Commons,' says Lockhart, an ardent Jacobite, 'behaved with all the insolence imaginable. In their discourse they boldly asserted, even in her Majesty's presence, that, if the right to the crown was hereditary and indefeasible, the prince beyond seas (meaning the king), and not the Queen, had the legal title to it, she having no claim thereto but what she owed to the people; and that by the Revolution principles, on which the constitution was founded, and to which the laws of the land agreed, the people might turn out or lay aside their sovereigns as they saw cause. Though, no doubt of it, there was a great deal of truth in these assertions, it is easy to be believed that the Queen was not well pleased to hear them maintained, even in her own presence, and in so solemn a manner, before such a great concourse of her subjects. For, though princes do cherish these and the like doctrines whilst they serve as the means to advance them-

the city of Prague. The Commons, who suspected James of being very lukewarm in his son-in-law's cause, appear to have been lashed into a sudden paroxysm of rage by this flippant expression. Floyd was condemned by the House to pay a fine of £1000, to stand in the pillory in three different places for two hours each time, and to be carried from place to place on horseback, without a saddle, with his face to the horse's tail, and the tail in his hand. The Lords, considering this proceeding to be an infringement of their privileges, requested a conference with the Commons. As early as the first year of Henry IV., an entry on the rolls of Parliament had declared that the Judicial power of Parliament did not belong to the Commons,[1] and in this very session they had come to a vote, prior to impeaching Mompesson, that they had no jurisdiction over cases which did not concern the privileges of their House. Without now formally confessing themselves in the wrong, they agreed that the prisoner should be arraigned before

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selves to a crown, yet, being once possessed thereof, they have as little satisfaction in them as those who succeed by an hereditary unquestionable title.' (Lockhart Papers, i. 312.) The Lords found Sacheverell guilty by 67 votes to 59; but passed only a slight sentence, of suspension from preaching for three years, and that his sermons should be burnt by the hands of the common hangman. Queen Anne afterwards rewarded him with the rich living of St. Andrew's, Holborn. He died in 1724.

Oxford, Bolingbroke, and Ormond, 1715.

Robert Harley, Earl of Oxford; Henry St. John, Viscount Bolingbroke; and James Butler, Duke of Ormond.—Tory ministers impeached by the Commons for their share in negotiating the Peace of Utrecht, in 1713. Bolingbroke and Ormond fled to France, and were attainted in their absence. Oxford alleged in justification the immediate commands of the sovereign for what he had done, a defence which though it had failed to shelter Danby, and would not be tolerated now, found many supporters in the then unsettled state of the theory of Ministerial responsibility. After two years' imprisonment in the Tower, Oxford was set at liberty, the Commons, unable to agree with the Lords as to the mode of procedure, having declined to continue the prosecution.

This is the last instance of purely political impeachment. Constantly responsible to Parliament, Ministers have been restrained from the commission of the graver class of offences, and for minor errors of policy or conduct the loss of power has proved a sufficient punishment. 'The last hundred years,' says May (Const. Hist. ii. 93) 'present but two cases of impeachment—the one against *Mr. Warren Hastings*, on charges of misgovernment in India, the other against *Lord Melville* (in 1804), for alleged malversation in his office. The former was not a minister of the Crown, and he was accused of offences beyond the reach of Parliamentary control; and the offences charged against the latter had no relation to his political duties as a responsible minister.'

Warren Hastings, 1788. Melville, 1804.

[1] *Supra*, p. 335; Rot. Parl. iii. 427.

the Lords, and entered a declaration in their Journals that the proceedings in the Lower House should not be 'drawn or used as a precedent to the enlarging or diminishing of the lawful rights or privileges of either House.'[1]

The Parliament had now sat four months busily engaged in impeachments, enquiries into grievances, and the preparation of bills of reform, but without paying any attention to the King's request for a further supply in addition to the two subsidies already granted. Impatient at the delay and tired of listening to grievances, the King, much to the chagrin of the Commons, adjourned Parliament till November.

Session II. 1621. Nov. 20—Feb. 8, 1621–2.

Prosecution of Coke and Sandys.

When the Commons re-assembled in November they were in anything but a complacent frame of mind. During the recess, proceedings had been taken by the Court party against Sir Edward Coke and Sir Edwin Sandys, two of the most popular Parliamentary orators, which, though not ostensibly grounded on their conduct in the House, were believed to be due to that cause. A prosecution had been commenced against Coke on a charge of misdemeanour connected with the discharge of his late Judicial functions, and Sandys had been arrested, together with Selden, his legal adviser, examined before the Council, on some secret charge, and kept in confinement for a month. The Commons took up the cause of their members with great warmth. The accusers of Coke were ordered to be taken into custody by the Serjeant-at-arms, and a Committee was appointed to examine witnesses with the view of establishing the fact of a conspiracy against him, originating in hostility to his political conduct. Sandys was absent through illness, but although Mr. Secretary Calvert declared that his arrest had no connexion with his speeches in the House,

Irritation of the Commons thereat.

[1] Parl. or Const. Hist. v. 435. By the Lords, Floyd was adjudged, in addition to the punishment of the pillory, to pay a fine of £5000, to be degraded from the estate of a gentleman and held infamous, to be whipped at the cart's tail from the Fleet to Westminster Hall, and to be imprisoned for life in Newgate. On the following day, the whipping was remitted on a motion of Prince Charles.—Lords' Journ. 148.

two Members were appointed to visit him and solicit a disclosure of the truth.[1]

While expressing themselves willing to grant a moderate subsidy, the Commons resolved first of all to enter upon the question of grievances. On the proposition of Sir Edward Coke, a petition was drawn up against the growth of Popery. It asserted that both the Pope and the King of Spain were aspiring to universal dominion, the one in spirituals, the other in temporals; that to these two powers the English papists looked for support; and that their hopes had been recently raised by the report of an intended marriage between the Prince of Wales and the Infanta of Spain; the House therefore prayed that the King would marry his son to a Protestant princess, and would order an expedition to be sent against that power (meaning Spain) which first maintained the war in the Palatinate. The King having furtively obtained a copy of this petition, before its presentation, wrote a peremptory letter to the Speaker, forbidding the House to meddle generally with mysteries of State, and in particular not to speak of his son's match with the Daughter of Spain, or touch the honour of any prince his friend or ally. Sandys' commitment, he told them, was not for anything in his public conduct: adding, however, 'We think ourselves very free and able to punish any man's misdemeanours in Parliament, as well during their sitting as after: which we mean not to spare hereafter, upon any occasion of any man's insolent behaviour there that shall be ministered unto us.'[2] Undismayed by the King's menacing language, the Commons presented to him a strong but respectful justification of their conduct, in which, adverting to that part of the King's message which threatened them for freedom of speech, they claimed the privilege as their 'ancient and undoubted right, and an inheritance received from their

Petition against Popery and the Spanish match.

James forbids the House to 'meddle with mysteries of State.'

Remonstrance of the Commons.

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[1] Com. Journ. 643, 644, 662; Lingard, ix. 193.
[2] Parl. or Const. Hist. v. 492.

The King's reply.

ancestors.'[1] In a long, laboured, and sarcastic reply, James dwelt at length on their unfitness for meddling with matters of government far above their reach, commended to them the maxim '*ne sutor ultra crepidam*,' and concluded by remarking that, 'although he could not allow of the style calling their privilege *an ancient and undoubted right of inheritance*, but could rather have wished that they had said that their privileges were derived from the grace and permission of his ancestors (for most of them had grown from precedents, which shows rather a toleration than inheritance), yet he gave them his royal assurance that so long as they contained themselves within the limits of their duty, he would be as careful of their lawful liberties and privileges as of his own prerogative, but so that their House did not touch on that prerogative, which would enforce him, or any just king, to retrench their privileges.'[2]

It was impossible for the Commons to leave unanswered this explicit attack upon the essential privileges which they claimed as their birthright. On the eve of the Christmas recess, they drew up and recorded in their Journal their memorable Protestation of the 18th December, 1621, in these words :—

Protestation of Dec. 18, 1621.

'The Commons now assembled in Parliament, being justly occasioned thereunto, concerning sundry liberties, franchises, privileges, and jurisdictions of Parliament, amongst others not here mentioned, do make this Protestation following :—

'That the liberties, franchises, privileges, and jurisdictions of Parliament, are the ancient and undoubted birthright and inheritance of the subjects of England :

'And that the arduous and urgent affairs concerning the King, State, and defence of the realm, and of the Church of England, and the maintenance and making of laws, and redress of mischiefs and grievances, which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament :

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[1] Parl. or Const. Hist. v. 497.
[2] *Ibid.* v. 507.

'And that in the handling and proceeding of those businesses, every member of the House of Parliament hath, and of right ought to have, freedom of speech to propound, treat, reason, and bring to conclusion, the same:

'And that the Commons in Parliament have like liberty and freedom to treat of these matters, in such order as in their judgment shall seem fittest:

'And that every member of the said House hath like freedom from all impeachment, imprisonment and molestation (other than by the censure of the House itself), for or concerning any speaking, reasoning, or declaring any matter or matters, touching the Parliament, or Parliament business:

'And that if any of the said members be complained of and questioned for anything done or said in Parliament, the same is to be showed to the King by the advice and assent of all the Commons assembled in Parliament, before the King give credence to any private information.'[1]

Sending for the Journals of the Commons, James, in the presence of his Council, tore out the obnoxious Protestation with his own hand. He dissolved Parliament; and revenged himself on the 'ill-tempered spirits who by their cunning diversions had imposed on him the necessity of discontinuing it,' by committing Sir Edward Coke and Sir Robert Phelips to the Tower, and Mr. Selden, Mr. Pym, and Mr. Mallory to other prisons: while Sir Dudley Digges, Sir Thomas Crewe, Sir Nathaniel Rich, and Sir James Perrot, were sent in a sort of honourable banishment, to act as Royal Commissioners in Ireland.[2] 'It is worthy of observation,' remarks Hallam, 'that in this session a portion of the Upper House had united in opposing the Court. Their opposition must be reckoned an evident sign of the change that was at work in the spirit of the nation, and by which no rank could be wholly unaffected.' This minority in the Lords included Oxford, Southampton,

Parliament dissolved, Feb. 8, 1621–2.

Imprisonment of members.

[1] Com. Journ. i. 668; Parl. or Const. Hist. v. 512, 513.
[2] Parl. or Const. Hist. v. 525.

Essex, Warwick, Saye, and Spencer. The Earls of Oxford and Southampton were summoned before the Council, and the former, on pretence of having spoken words against the King, was committed to the Tower.[1]

Fourth Parliament. 1623–4. Feb. 19—May 29.

James's fourth and last Parliament met on the 19th February, 1623–4. The abandonment of the projected marriage between the Prince of Wales and the Infanta of Spain, in which the King was reluctantly induced to acquiesce through the interested influence of the favourite Buckingham, rendered the Commons unexpectedly complaisant. James on his part, exhibited a condescension equally unusual. He submitted for their consideration and advice, the matrimonial negotiations with Spain, and the desirability of entering into a war for the recovery of the Palatinate, and even promised, that if they would grant the money for the war, it should be paid into the hands of treasurers appointed by the Commons, and that he would not treat of peace without previously taking their advice. The Commons voted three subsidies and three fifteenths (about £300,000) ; and eight citizens were appointed treasurers, and ten other selected persons a council of war, all of whom were to be accountable for their conduct to the Commons in Parliament.[2]

Besides confirming their right to impeach the Ministers of the Crown, by their proceedings against the Earl of Middlesex, to which reference has been already made, the Commons, in this session, procured the passing of several salutary statutes, of which the most important was a declaratory 'Act concerning Monopolies, and Dispensations with Penal Laws and the Forfeitures thereof.' All monopolies ; all licences to do, use, or exercise anything against the tenor or purport of any law or statute, or to agree or compound with others for any penalty or forfeiture limited by any statute ; all grants or promises of the benefit or profit of any forfeiture or penalty due on any

Act against Monopolies.

[1] Hallam, Const. Hist. i. 368.
[2] Parl. or Const. Hist. vi. 333.

statute, made before judgment thereupon had; and all proclamations, inhibitions, and other proceedings any way tending to the furthering or countenancing of the same or any of them,—were declared to be contrary to the ancient and fundamental laws of the realm, and utterly void.[1]

On the 29th May, 1624, James dissolved his last Parliament, in which, for the first time throughout his reign, hardly any difference had arisen between the Crown and the Commons. He died on the 27th of March, 1625. The Constitutional results of his reign are thus concisely summed up by Hallam: 'The Commons had now been engaged for more than twenty years in a struggle to restore and to fortify their own and their fellow-subjects' liberties. They had obtained in this period but one legislative measure of importance, the late declaratory act against monopolies. But they had rescued from disuse their ancient right of impeachment. They had placed on record a protestation of their claim to debate all matters of public concern. They had remonstrated against the usurped prerogatives of binding the subject by proclamation, and of levying customs at the out-ports. They had secured beyond controversy their exclusive privilege of determining contested elections of their members. Of these advantages, some were evidently incomplete, and it would require the most vigorous exertions of future Parliaments to realize them.'[2]

Constitutional results of James's reign.

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[1] 21 Jac. I. c. 3. It is under an exception contained in this Act that the Crown has since exercised the right of granting letters-patent for new inventions, which would otherwise have been included in the general declaration against monopolies. It is provided that the Act 'shall not extend to letters-patent and grants of privilege for the term of fourteen years and under, thereafter to be made, of the sole working or making of any manner of *new manufactures within this realm* to the *true and first inventor* or inventors of such manufactures, which others, at the time of making such letters-patent and grants, shall not use.'

Patents for inventions

[2] Hallam, Const. Hist. i. 373.

CHARLES I. 1625–1649.

At the age of 25, CHARLES I. succeeded to the throne on the death of his father, March 27th, 1625.

His political character.

Nurtured from his infancy in the doctrine of the Divine right and absolute power of kings, which James I. had so industriously promulgated, and which the Church, the Court, and the Judicial Bench had openly espoused as the true principles of religion and policy, Charles 'came a party man to the throne, and continued an invasion on the people's rights while he imagined himself only concerned in the defence of his own.'[1] Distrust of his own judgment and too great a deference for the opinions of others, whose ill advice he followed, are the greatest faults admitted by his zealous partisan Lord Clarendon. Unhappy in the choice of his councillors—in Buckingham, Strafford, and Laud, more especially—he certainly was, but it was his own insincerity and innate propensity to intrigue which contributed more than anything else to embitter the struggle between him and his people, and which in the end effectually closed the door against reconciliation. 'Faithlessness,' observes Macaulay, 'was the chief cause of his disasters, and is the chief stain on his memory. He was, in truth, impelled by an incurable propensity to dark and crooked ways. It may seem strange that his conscience, which, on occasions of little moment, was sufficiently sensitive, should never have reproached him with this great vice. But there is reason to believe that he was perfidious, not only from constitution and from habit, but also on principle. He seems to have learned from the theologians whom he most esteemed that between him and his subjects there could be nothing of the nature of mutual contract; that he could not, even if he would, divest himself of his despotic authority; and that in every promise which he made, there was an implied reservation that such promise might be broken in case of necessity, and that of the necessity he was the sole judge.'[2]

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[1] Bolingbroke, i. 516.
[2] Macaulay, Hist. Eng. i. [84].

First Parliament of Charles I. 1625, June 18–Aug. 12.

The first fifteen months of Charles's reign saw two Parliaments successively summoned and abruptly dissolved. Guided by the pernicious counsels of Buckingham, his heart was set upon a war with Spain, a war which, though approved by the last Parliament of his father, had not yet been declared, and might easily have been avoided. Before commencing hostilities, funds were absolutely necessary, and Charles expected from the Commons a large and unconditional grant. But the members of the Lower House were much more impressed with the necessity of securing the redress of grievances and placing the enjoyment of Civil liberty upon a secure basis, than eager for the prosecution of the war. They accordingly doled out supplies very sparingly, granting, in the first Parliament but two subsidies (about £140,000), together with the customs duties of tonnage and poundage for one year only, instead of for the King's life as had for two centuries been the practice.[1] They had no intention of refusing a further supply, but were resolved to avail themselves of their Constitutional right to make it dependent upon redress of grievances. Professing themselves 'ready in a convenient time, and in a parliamentary way, to afford all necessary supply to his Majesty upon his present and all other his just occasions,' they were equally determined 'freely and dutifully to do their utmost endeavours to discover and reform the abuses and grievances of the realm and state.' Indignant that they should thus dare to prescribe to him, the King hastily dissolved his first Parliament, and endeavoured to raise money upon Privy Seals;[2] but within six months he again found it necessary to seek Parliamentary aid.

Its dissolution, Aug. 12, 1625.

Opposition to Buckingham.

One of the chief causes of the late dissolution had been the desire of Charles to screen his favourite Buckingham from an anticipated impeachment by the Commons. One of the most learned and moderate members, Sir Robert

Speech of Sir R. Cotton.

[1] The Lords refused their consent to this limited grant, and Charles caused the tonnage and poundage to be levied without any Parliamentary authority.

[2] On the reception which 'Privy Seals' met with in some counties, see Hamilton, Quarter Sessions, Elizabeth to Anne.

Cotton, in a significant though apparently humble speech, had reminded the House of the control formerly exercised over the King's Ministers, and alluded to 'the young and simple counsel' by which the King was led. 'We do not desire,' he said, 'as 5 Henry IV., or 29 Henry VI., the removing from about the King any evil councillors. We do not request a choice by name, as 14 Edward II., 3, 5, 11 Richard II., 8 Henry IV., or 31 Henry VI.; nor to swear them in Parliament, as 35 Edward I., 9 Edward II., or 5 Richard II.; or to line them out their directions of rule, as 43 Henry III., and 8 Henry VI.; or desire that which Henry III. did promise in his 42nd year, "se acta omnia per assensum magnatum de concilio suo electorum, et sine eorum assensu nihil." We only in loyal duty offer up our humble desires, that since his Majesty hath, with advised judgment, elected so wise, religious, and worthy servants, to attend him in that high employment, he will be pleased to advise with them together a way of remedy for these disasters in state, brought on by long security and happy peace; and not be led with young and simple counsel.'[1]

Second Parliament, Feb. 6, 1625–6–June 15, 1626.

Impeachment of Buckingham.

Care had been taken to prevent several of the most popular orators of the last Parliament from sitting in the new assembly by appointing them sheriffs[2] for the year: but this manœuvre failed in its effects. Irritated more than ever against the favourite, the new Parliament determined to proceed to his Impeachment. Whilst the Commons were preparing materials for the charge, the King sent them word: 'I must let you know that I will not allow any of my servants to be questioned amongst you, much less such as are of eminent place and near unto me. Buckingham, he assured them, had done nothing without his own special direction and appointment and as his servant. 'I wish,' he added in conclusion, 'you would hasten

The King's message.

[1] Parl. or Const. Hist. vi. 372.

[2] Among them were Sir Edward Coke, Sir Robert Phelips, Sir Thomas Wentworth (who had not yet gone over to the Court party), and Sir Francis Seymour.

my supply, or else it will be worse for yourselves; for if any ill happen, I think I shall be the last that shall feel it.'[1]

Notwithstanding this haughty message the Commons resolved that three subsidies and three fifteenths should be granted to the King: but with a proviso that the bill of supply should only be brought in after they had presented their grievances and received the King's answer. Addressing the King, they declared 'that it had been the ancient, constant, and undoubted right and usage of Parliament to question and complain of all persons, of what degree soever, found grievous to the Commonwealth, in abusing the power and trust committed to them by their sovereign.' And as to the supply, that 'though it had been the long custom of Parliaments to handle the matter of supply with the last of their businesses; yet, at that time, out of extraordinary respect to his person and care of his affairs, they had taken the same into more speedy consideration,' and had agreed to a resolution for a present supply.[2] They subsequently agreed to add a fourth subsidy, and prepared a Bill to grant the King tonnage and poundage for life, but directed that concurrently with it a remonstrance should be drawn up against his taking those duties without the previous grant of Parliament.[3]

Reply of the Commons.

Buckingham was now formally impeached.[4] Two of the managers on the part of the Commons, Sir John Eliot and Sir Dudley Digges, were committed to the Tower by the King for alleged insolence of speech. The Commons, incensed, declared that they would do no more business, until their members were set at liberty. Sir Dudley Carleton, Vice-Chamberlain of the Household, endeavoured to frighten the House into submission by insinuating that the King might very likely be tempted to govern without a Parliament, like the Princes on the continent. But the

Members of the Commons imprisoned.

[1] Parl. or Const. Hist. vi. 430, 431.
[2] *Ibid.* vi. 464–468.
[3] Parl. or Const. Hist. vii. 36.
[4] *Supra*, p. 543, *n.* [Cf. *post*, *App.*—Ed.]

Commons compelled him to apologise, and a large number of peers having assured the King that Sir Dudley Digges had not spoken the words imputed to him, the two prisoners were shortly afterwards released.

Attack on the privileges of the Lords. 1626.

Not contented with attacking the privileges of the Commons, Charles was imprudent enough to wantonly provoke a quarrel with the House of Lords. For permitting his son, without the King's licence, to marry a daughter of the Duke of Lennox, a lady of Royal blood, the Earl of Arundel (an enemy of Buckingham) was committed to the Tower during the session of Parliament. The Lords, resenting this attack upon their privileges, resolved, 'that no lord of Parliament, the Parliament sitting, or within the usual times of privilege of Parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason or felony, or for refusing to give surety for the peace.' After a contest of three months between the King and the Lords, Arundel was at length set at liberty.

Earl of Arundel.

Earl of Bristol.

Another enemy whom Buckingham specially feared was the Earl of Bristol (John Digby), who having been Ambassador to Spain at the time of Prince Charles's visit, had it in his power to make most damaging disclosures concerning the Duke's conduct there. Charles refused him a writ of summons to Parliament. Bristol complained to the Peers of this violation of their common privilege; and the Peers insisting, the King sent the writ, but with a letter forbidding the Earl to avail himself of it on pain of the Royal displeasure. This letter he laid before the House of Lords, and the next day the Attorney-General, by the King's order, charged him with high treason at the bar of the House. Bristol retaliated by impeaching the Duke of Buckingham, who thus became the object of two concurrent prosecutions, respectively instituted by the House of Commons and by a former colleague in the late King's service.

Hasty dissolution. June 15, 1626.

To protect his favourite, and at the same time to thwart the pretension of Parliament, involved in this attack upon Buckingham, to control the appointment of the Ministers of the Crown, Charles determined to dissolve Parliament.

The Peers petitioned against this design, but the King angrily replied, 'No, not a minute,' and the dissolution was immediately declared.[1]

By this hasty and ill-advised dissolution before the liberal subsidies conditionally promised had been granted, the King found himself without funds to carry on the war with Spain. He again had recourse to the old illegal methods of raising money. Tonnage and poundage were arbitrarily exacted; commissions were issued to compound with recusants for dispensing with the penal laws; Privy Seals and Benevolences were demanded from the rich; and the seaport towns were ordered to furnish vessels armed and equipped, the first attempt at ship-money. But that which excited the greatest indignation was the levying and exacting of a general loan from every subject, according to the rate at which he had been assessed to the last subsidy. The common people who refused to contribute were punished by impressment into the navy; many of the gentry were committed to prison; several regiments of soldiers were sent into different counties and quartered upon the inhabitants; and in some places Martial Law was enforced. Chief Justice Crewe, who refused to admit the legality of the loan, was punished by dismissal from his office.

Expedients to raise money.

A general loan demanded:

and payment enforced.

Of the many persons imprisoned throughout England for refusing the loan, five only, Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham and Sir Edmund Hampden (cousin of John Hampden, afterwards so celebrated) sued out their writs of *habeas corpus* in the King's Bench, to which the Warden of the Fleet returned that they were detained under a warrant from the Privy Council by *special command of the King*. This gave rise to a most important discussion as to the sufficiency of such a return as a legal cause of detention, there being no charge made against the prisoners. Noy, Selden, and other eminent counsel for the prisoners, argued with much ability and

Darnel's case, November, 1627.

[1] Parl. or Const. Hist. vii. 290.

learning in favour of the chartered immunity of English subjects from arbitrary detention, against the Attorney-General, Sir Robert Heath, who upheld the absolute prerogative of the Crown. The Judges displayed great moderation and apparent impartiality while the question was being argued, but in the end Sir Nicholas Hyde, Chief Justice, gave the decision of the Court in favour of the Crown, and the prisoners were remanded to custody—a custody which, by this judgment, might be indefinitely prolonged, without any specific charge being brought against the prisoners, or any trial with its consequent condemnation or acquittal.[1] The temporary triumph of the King was dearly bought at the price of the dismay and indignation which it spread among the people, who saw their fundamental right of personal liberty practically annihilated by this decision.

War with France.

Undeterred by the difficulties which he had encountered in providing for the war with Spain, Charles rashly entered, at the instigation of Buckingham, upon a fresh war with France. After the disastrous and humiliating failure of the expedition of the favourite to the Isle of Rhé (12 July—12 Oct. 1626), the absolute necessity of a large supply for carrying on the war forced the King to summon a third Parliament. Previously to its assembling, it was deemed advisable to release the persons imprisoned for refusing the loan. Seventy-eight were thus set at liberty; of whom twenty-seven (Sir Thomas Wentworth, afterwards Earl of Strafford, being of the number) were immediately returned to the new Parliament. Charles opened the session with a proud and threatening speech. 'There is none here,' he said, 'but knows that common danger is the cause of this Parliament, and that supply, at this time, is the chief end of it. . . . Every man must now do according to his conscience; wherefore, if you (which God forbid) should not do your duties in contributing what the State at this time needs, I must, in discharge of my conscience, use those

Third Parliament, Session I. March 17, 1627—June 26, 1628.

The King's speech.

[1] Darnel's case, 3 St. Tr. 1. [Cf. Denman's Broom's Const. Law, p. 158, *seq.*, and Note, p. 204, *seq.*—ED.]

other means, which God hath put into my hands, to save that which the follies of some particular men may otherwise hazard to lose. Take not this as a threatening (for I scorn to threaten any but my equals), but an admonition from him that, both out of nature and duty, hath most care of your preservation and prosperities.' The Lord-Keeper added: 'This mode (of supply), as his Majesty hath told you, he hath chosen, not as the only way, but as the fittest; not as destitute of others, but as most agreeable to the goodness of his own most gracious disposition, and to the desire and weal of his people. If this be deferred, necessity and the sword of the enemy will make way to the others. Remember his Majesty's admonition; I say remember it.'[1] The Commons were not at all disturbed by this menacing language. 'We have come together,' said Wentworth, who was so soon to desert the Popular cause, 'firmly determined on vindicating our ancient vital liberties, by reinforcing our ancient laws made by our ancestors; by setting forth such a character of them as no licentious spirit shall dare to enter upon them.' They at once resolved themselves into a Committee of Grievances to consider 'the liberty of the subject in person and estate.' The principal matters discussed were: (1) illegal exactions under the name of loans; (2) the arbitrary commitment of those who refused compliance, and especially the recent decision of the King's Bench remanding Sir Thomas Darnel and others upon a *habeas corpus;* (3) the billeting of soldiers on private persons; and (4) the infliction of punishment by Martial Law. After passing resolutions 'That no freeman ought to be imprisoned or restrained by command of the King, or the Privy Council, or any other, except for lawful cause expressed in a lawful warrant; and that the ancient and undoubted right of every freeman is, that he hath a full and absolute property in his goods and estate; and that no tax, talliage, loan, benevolence, or other like charge, ought to be commanded or levied by the King or his ministers,

Committee of grievances.

Commons' resolutions.

[1] Parl. or Const. Hist. vii. 339.

without common assent of Parliament,' the Commons applied to the Lords for a Conference, in order to agree on a petition to the King for a declaratory confirmation of these liberties. For two months the attention of both Houses, either in conference or in separate debate, was almost exclusively devoted to this momentous subject, which was exhaustively argued by Selden, Coke, Littleton, Digges, Noy, and other eminent lawyers on the part of the Commons, and by the Attorney-General Heath, Serjeant Ashley, and others, as counsel for the Crown. In the meantime the Commons, anxious not to give the King any just cause of offence, unanimously voted the unusually large amount of five subsidies (£350,000), but deferred the passing of a regular Money Bill until their grievances should be redressed. The King tried hard to satisfy the Commons by offering his Royal word not to arrest any one without just cause, or a simple confirmation of the Great Charter and the other ancient statutes in favour of liberty. But Sir Edward Coke warned the House to proceed by Bill. 'Was it ever known,' he said, 'that general words were a sufficient satisfaction for general grievances? The King's answer is very gracious; but what is the law of the realm? that is the question. I put no diffidence in his Majesty; but the King must speak by record, and in particulars, and not in general. *Let us put up a Petition of Right;* not that I distrust the King, but that I cannot take his trust, save in a parliamentary way.'[1]

Conference with the Lords.

Speech of Sir Edward Coke.

The Petition of Right was then drawn up by the Commons. The Lords vainly proposed as an amendment: 'We humbly present this petition to your Majesty, not only with a care of preserving our own liberties, but with due regard to leave entire that *sovereign power* wherewith your Majesty is trusted for the protection, safety, and happiness of your people.' This insidious saving clause was firmly rejected by the Commons. 'Let us look into the records,' said Mr. Alford, a member, 'and see what

Petition of Right drawn up by the Commons.

Amendment proposed by the Lords,

which is discussed and rejected by the Commons.

[1] Parl. or Const. Hist. viii. 104.

they are: what is "sovereign power?" Bodin saith that it is free from any conditions. By this we shall acknowledge a regal as well as a legal power. Let us give that to the King the law gives him and no more.' 'I am not able,' said Pym, 'to speak to this question, for I know not what it is. All our petition is for the laws of England; and this power seems to be another distinct power from the power of the law. I know how to add "sovereign" to the king's person, but not to his power; and we cannot "leave" to him a "sovereign power," for we never were possessed of it.' Sir Edward Coke said: 'This is *magnum in parvo.* This is propounded to be a conclusion of our petition. It is a matter of great weight; and, to speak plainly, it will overthrow all our petition; it trenches to all parts of it; it flies at loans, at the oath, at imprisonment, and at billeting of soldiers: this turns all about again. Look into all petitions of former times; they never petitioned wherein there was a saving of the king's sovereignty. I know that prerogative is part of the law, but "sovereign power" is no parliamentary word. In my opinion it weakens Magna Charta, and all the statutes; for they are absolute, without any saving of "sovereign power;" and should we now add to it, we shall weaken the foundations of law, and then the building must needs fall. Take we heed what we yield unto: Magna Charta is such a fellow, that he will have no "sovereign." I wonder this "sovereign" was not in Magna Charta, or in the confirmations of it. If we grant this, by implication we give a "sovereign power" above all laws. Power, in law, is taken for a power with force; the sheriff shall take the power of the county; what it means here, God only knows. It is repugnant to our petition; that is, a Petition of *Right*, grounded on Acts of Parliament.' In a further conference with the Lords, Sir Henry Martyn dwelt with much force upon the moderation displayed by the Commons as a reason for supporting the petition in its integrity. 'The moderate and temperate carriage of the House of Commons in this Parliament,' he said, 'be it spoken without

vanity, and yet in much modesty, may seem to deserve your lordships' assistance in this petition *ex congruo et condigno;* especially if you would be pleased to consider the discontents, pressures, and grievances, under which themselves, in great number, and the parts for which they serve, lamentably groaned, when they first arrived here; and which was daily represented unto them by frequent packets and advertisements out of their several counties: all which, notwithstanding, have not been able to prevail upon our moderation, or to cause our passion to overrule our discretions; and the same yet continueth in our hearts, in our hands, and in our tongues: as appeareth in the mould of this petition, wherein we pray no more but that we may be better treated hereafter. My Lords, we are not ignorant in what language our predecessors were wont to express themselves upon much lighter provocation; and in what style they framed their petitions: no less amends could serve their turn than severe commissions to inquire upon the violators of their liberties; banishment of some, execution of other offenders; more liberties, new oaths of magistrates, judges, and officers, with many other provisions written in blood. Yet from us there hath been heard no angry word in this petition. No man's person is named. We say no more than what a worm trodden on would say (if he could speak), "I pray tread on me no more."'

The King consults the Judges.

At length the Lords passed the petition without any material alteration, and it awaited only the Royal assent to acquire the force of law. In the meantime Charles sent for the two Chief Justices, Hyde and Richardson, and submitted to them certain questions to be answered by themselves and the other Judges. One was 'Whether, if the King grant the Commons' petition, he doth not thereby exclude himself from committing or restraining a subject, for any time or cause whatsoever, without showing a cause?' To this the Judges replied, 'Every law after it is made, hath its exposition, and so this petition and answer must have an exposition, as the case in the nature thereof shall require to stand with justice; which is to be left to the courts

of justice to determine, which cannot be particularly discovered until such case shall happen. And although the petition be granted, there is no fear of conclusion as is intimated in the question.'[1] This indirect promise of compliance on the part of the Judges was apparently unsatisfactory to the King, who had no intention of really parting with the prerogative of arbitrary commitment. On the 2nd of June, 1628, he attended in the House of Lords to give his answer to the Bill, before the Peers and Commons in Parliament. To the surprise of all men, instead of the usual concise and clear form of words by which a Bill receives the Royal assent, Charles returned a long and equivocal answer, that 'the King willeth that right be done according to the laws and customs of the realm, and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrong or oppression contrary to their just rights and liberties; to the preservation whereof he holds himself in conscience as well obliged, as of his prerogative.' Highly incensed at this evasive reply, which was tantamount to a refusal to pass the Bill, the Commons gave vent to their ill-humour by impeaching Dr. Mainwaring,[2] and were proceeding to censure the favourite Buckingham, when, on the joint application of the Lords and Commons, the King at length signified the Royal assent in the customary form—'Soit droit fait come est desiré'—which gave to this second great fundamental compact between the Crown and the Nation the sanction of an Act of Parliament.

The King's first answer.

The Royal assent is [at length] given in due form.

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[1] Hargrave MSS. xxxii. 97, cited by Hallam [Const. Hist. i. 391].

[2] *Supra*, p. 543, *n.*

[Mr. Alford's citation of Bodinus, *supra*, p. 565, bears out Hallam's view, *Int. to Lit. of Europe*, 1839, ii. 204–5, *n.*, where he says, 'I am much inclined to believe that the perusal of Bodin had a great effect in England. . . He furnished a store, both of arguments and of examples, which were not lost on the thoughtful minds of our countrymen.' This is exactly the use to which Mr. Alford puts him.—ED.]

PETITION OF RIGHT.

3 Car. I. c. 1. (7 June, 1628.)

The Peticion exhibited to his Majestie by the Lords Spirituall and Temporall and Commons, in this present Parliament assembled, concerning divers Rights and Liberties of the Subjects: with the King's Majestie's royall aunswere thereunto in full Parliament.

To the King's most Excellent Majestie,

Illegal exactions.

Humbly show unto our Soveraigne Lord the King, the Lords Spirituall and Temporall, the Commons in Parliament assembled, that whereas it is declared and enacted by a statute made in the tyme of the raigne of King Edward the First, commonly called *Statutum de Tallagio non Concedendo*,[1] that no tallage or ayde should be layd or levyed by the King or his heires in this realme, without the good will and assent of the archbishopps, bishopps, earles, barons, knights, burgesses, and other the freemen of the commonaltie of this realme; and by authoritie of Parliament holden in the five-and-twentieth yeare of the raigne of King Edward the Third,[2] it is declared and enacted, that from thenceforth no person should be compelled to make any loanes to the King against his will, because such loanes were against reason and the franchise of the land; and by other lawes of this realme, it is provided, that none should be charged by any charge or imposicion called a benevolence, or by such like charge;[3] by which statutes before mencioned, and other the good lawes and statutes of this realme, your subjects have inherited this freedome that they should not be compelled to contribute to any taxe, tallage, ayde, or other like charge, not sett by common consent in Parliament.

II. Yet nevertheless of late divers commissions directed to sundry commissioners in severall counties, with instruccions, have issued; by meanes whereof your people have been in divers places assembled, and required to lend certaine sommes of money unto your Majestie, and many of them uppon their refusall so to doe, have had an oath administred unto them not warrantable by the lawes or statutes of this realme, and have been constrayned to become bound and make appearance and give attendance before your Privie Councell, and in other places, and others of them

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[1] *Supra*, p. 272.
[2] See Rot. Parl. ii. 238, No. 11.
[3] 1 Ric. III. c. 2.

have been therefore imprisoned, confined, and sondry other waies molested and disquieted; and divers other charges have been laid and levied upon your people in severall counties by lord lieutenants, deputy lieutenants, commissioners for musters, justices of peace and others, by commaund or direccion from your Majestie, or your Privie Councell, against the lawes and free customes of the realme.

Arbitrary imprisonment.

III. And where[as] alsoe by the statute called the 'Great Charter of the Liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customes, or be outlawed or exiled, or in any manner destroyed, but by the lawfull judgment of his peeres, or by the law of the land.[1]

IV. And in the eight-and-twentieth yeere of the raigne of King Edward the Third, it was declared and enacted by authoritie of Parliament that no man, of what estate or condicion that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answere by due process of lawe.[2]

V. Neverthelesse, against the tenor of the said statutes, and other the good lawes and statutes of your realme to that end provided,[3] divers of your subjects have of late been imprisoned without any cause shewed; and when for their deliverance they were brought before your justices by your Majestie's writts of *habeas corpus*, there to undergoe and receive as the court should order, and their keepers commaunded to certifie the causes of their detayner, no cause was certified, but that they were deteined by your Majestie's speciall commaund, signified by the lords of your Privie Councell, and yet were returned backe to severall prisons, without being charged with anything to which they might make aunswere according to the lawe.

Billeting of soldiers and mariners.

VI. And whereas of late great companies of souldiers and marriners have been dispersed into divers counties of the realme, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourne against the lawes and customes of this realme, and to the great greivance and vexacion of the people.[4]

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[1] 9 Hen. III. c. 29; *supra*, p. 137.

[2] 28 Edw. III. c. 3.

[3] See 37 Edw. III. c. 18, 38 Edw. III. c. 9, 42 Edw. III. c. 3, 17 Ric. II. c. 6.

[4] By stat. 31 Car. II. c. 1, it is enacted that no officer, military or civil, or other persons, shall quarter or billet any soldier upon any inhabitant of this realm without his consent, and that every such inhabitant may refuse to quarter any soldier, notwithstanding any order whatsoever. The provisions of the Petition of Right and of this statute of Charles II. against billeting are annually suspended by the Mutiny Act, which expressly gives permission to billet soldiers in inns and victualling houses.

Martial law. VII. And whereas alsoe by authoritie of Parliament, in the five-and-twentieth yeare of the raigne of King Edward the Third, it is declared and enacted that no man shall be forejudged of life or limbe against the forme of the Great Charter and the lawe of the land; and by the said Great Charter and other the lawes and statutes of this your realme, no man ought to be adjudged to death, but by the lawes established in this your realme, either by the customes of the same realme or by Acts of Parliament; and whereas no offender of what kinde soever, is exempted from the proceedings to be used, and punishments to be inflicted by the lawes and statutes of this your realme: neverthelesse of late tyme divers commissions under your Majestie's Great Seale have issued forth, by which certaine persons have been assigned and appointed commissioners with power and authoritie to proceed within the land, according to the justice of martiall lawe, against such souldiers or marriners, or other dissolute persons joyning with them, as should commit any murther, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to martiall lawe, and as is used in armies in tyme of warr, to proceed to the tryall and condemnacion of such offenders, and them to cause to be executed and putt to death according to the lawe martiall.

By pretext whereof some of your Majestie's subjects have been by some of the commissioners put to death, when and where, if by the lawes and statutes of the land they had deserved death, by the same lawes and statutes alsoe they might, and by no other ought, to have byn judged and executed.

And alsoe sundrie greivous offenders, by colour thereof clayming an exempcion, have escaped the punishments due to them by the lawes and statutes of this your realme, by reason that divers of your officers and ministers of justice have unjustlie refused or forborne to proceed against such offendors according to the same lawes and statutes, uppon pretence that the said offendors were punishable onelie by martiall law, and by authoritie of such commissions as aforesaid; which commissions, and all other of like nature, are wholly and directlie contrary to the said lawes and statutes of this your realme.

Remedies prayed for: VIII. They doe therefore humblie pray your most excellent Majestie that no man hereafter be compelled to make or yeild any guift, loane, benevolence, taxe, or such like charge, without common consent by Acte of Parliament; and that none be called to make aunswere or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusall thereof; and that no freeman, in any such manner as is before mencioned, be imprisoned or deteined; and that your Majestie would be pleased to remove the said souldiers and marriners, and that your people may not be soe burthened in tyme to come; and that the aforesaid commissions, for

proceeding by martiall lawe, may be revoked and annulled: and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majestie's subjects be destroyed or put to death contrary to the lawes and franchise of the land.

as their rights and liberties according to the laws and statutes.

All which they most humblie pray of your most excellent Majestie as their rights and liberties, according to the lawes and statutes of this realme; and that your Majestie would alsoe vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premisses, shall not be drawn hereafter into consequence or example; and that your Majestie would be alsoe graciouslie pleased, for the further comfort and safetie of your people, to declare your royall will and pleasure, that in the things aforesaid all your officers and ministers shall serve you according to the lawes and statutes of this realme, as they tender the honor of your Majestie, and the prosperitie of this kingdome.

Qua quidem peticione lectâ et plenius intellectâ per dictum dominum regem taliter est responsum in pleno parliamento, videlicet, Soit droit fait come est desiré. (Statutes of the Realm, v. 23, 24.)

Subsidies granted.

Tonnage and poundage.

The Commons were triumphant; and grateful amidst their rejoicings. They immediately passed a Bill granting the five subsidies already promised; and were preparing another giving the King tonnage and poundage for life, but delayed its passing in order to remonstrate against the continued illegal levying of those duties without the sanction of Parliament, and to pray for the removal from office of Buckingham, to whose evil influence they attributed all the misfortunes of the kingdom both at home and abroad. To prevent the delivery of this remonstrance, the King suddenly (June 26th) prorogued Parliament.

Parliament prorogued, 26 June, 1628.

Session II 1628–9. 20 Jan.—10 March.

Merchants imprisoned for refusing to pay tonnage and poundage.

On the 20th of January, 1628–9, the two Houses reassembled. During the recess the assassination of Buckingham by Felton (Aug. 23rd) had removed one great cause of contention between Charles and his people; but the King had continued, in violation of the Petition of Right,[1] to raise the Customs duties as before, and several

[1] The Customs duties were not mentioned by name in the Petition of Right,

merchants, on refusal to pay, had been punished by distraint of their goods and imprisonment. On appealing to the Courts of Law, they were informed by the Judges that the King's right was conclusively established by the decision in Bates's case.

Copies of Petition of Right circulated with King's first answer annexed.

The natural irritation of the Commons was increased on hearing that the speech in which Charles, at the close of the last session, had claimed tonnage and poundage as his due, had been entered on the Parliament roll together with the Petition of Right, and that he had caused 1,500 copies of that great Constitutional compact between the Crown and the People to be circulated throughout the country with his first and repudiated answer annexed, in addition to the final answer which alone formed part of the statute.[1]

Selden complains to the House.

Selden at once complained to the House of the breach (as he alleged) of the Petition of Right in the case of the merchants whose goods had been seized, and also of the cutting off of a man's ears by an arbitrary judgment of the Star Chamber. 'Next,' he said, 'they will take away our arms, and then our legs, and so our lives; let us all see we are sensible of this. Customs creep on us; let us make a just representation hereof unto his Majesty.' The dispute as to tonnage and poundage was embittered and complicated by the fact that Henry Rolle, one of the merchants

Question of privilege: *Rolle's case.*

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but it might fairly be contended that there were included in the words 'taxe or such like charge' which that statute had declared that no man should be compelled to pay without common consent by Act of Parliament. The word 'tax' had actually been employed officially, to include Customs duties. (See *Edinburgh Review*, Jan. 1876.) In the remonstrance which the Commons were prevented from delivering by the prorogation, they had declared that the levying of tonnage and poundage without consent was illegal by the Petition of Right. Charles, however, relied on the decision of the Judges in Bates' case (*supra*, p. 519), and the legal question was certainly not free from doubt.

[1] State Papers [Dom. 1628–9, p. 456], cxxxiii. 4; S. R. Gardiner, Pers. Gov. of Ch. I., i. 46. [Sir Francis Nethersole writes to the Queen of Bohemia (State Papers, *loc. cit.*), Jan. 24, 1629, that the House of Commons is much discontented with the printing of the Petition of Right with the several answers given thereto, and his Majesty's speech the last day of the session, it having been first printed with the answer, *Droit soit fait comme il est désiré*, and that impression afterwards suppressed. But that which troubleth them most, Sir Francis adds, is the recording that last speech of his Majesty in the Clerk's Book of the Commons House since the recess. The Commons evidently felt strongly that the authenticity of their Records was at stake.—ED.]

whose goods had been seized, was a member of the House. At this period, privilege of Parliament was held to protect not only the persons but the goods of members from arrest and although owing to the time (the middle of the Parliamentary recess) when the seizure in Rolle's case had been effected, it could only be brought technically within the privilege by means of a legal fiction, the Commons were disposed to resent the matter as an attack on their liberties: and while one member, Phelips, moved for a Committee on the whole question of the levy of tonnage and poundage, another, Littleton, desired that 'the parties be sent for that had violated the liberties.'[1] The King now thought it prudent to attempt to allay the rising storm. Sending for the two Houses to Whitehall, he explicitly renounced all claim to levy tonnage and poundage as of right. 'It ever was, and still is my meaning,' he told them, 'by the gift of my people to enjoy it, and my intention in my speech at the end of the last session was not to challenge tonnage and poundage of right, but for expedience *de bene esse*, shewing you the necessity, not the right, by which I was to take it until you had granted it unto me; assuring myself, according to your general profession, that you wanted time and not good will to give it me.'[2] This politic speech made a most favourable impression, and two days afterwards a proposal was made by Sir John Coke to bring in a Bill granting tonnage and poundage to the King; but there still remained a grievance which the Commons had even more at heart than illegal taxation, and the latter question was postponed until the recent innovations in religion had been discussed.

Charles renounces the right to levy tonnage and poundage.

The position taken up by the Commons alike in Politics and Religion was a conservative one. In Politics, they sought to preserve the free English Constitution as it had existed prior to the despotic practices of the Tudors and the despotic theories as well as practices of the Stuarts.

Conservative position of the Commons in politics:

[1] Gardiner, Pers. Gov. of Ch. I., i. 47, 48.
[2] Contarini's Despatch, Venetian MSS., cited by Gardiner, Pers. Gov. of Ch. I., i. 50.

and in religion.

In Religion, they adhered to the narrow Calvinistic theology which had been prominent in the National Church from the Reformation to the beginning of the seventeenth century. This they regarded as the orthodox doctrine, and considered it to be supported by the Prayer Book, the Catechism, the Homilies, the writings of Bishop Jewel, the Lambeth Articles of 1595, the Resolutions of the Synod of Dort in 1618, the uniform consent of writers whose works had been published by authority, and by the submission enjoined by the two Universities upon the opponents of the Lambeth Articles. They complained of the spread of Popery and Arminianism; the removal of communion-tables to be set up as altars at the eastern end of churches; the placing of candlesticks on them; and the obeisance made towards them; the ordering that congregations should stand up at the singing of the Gloria Patri, and that women coming to be churched should wear veils; the setting up of pictures and lights and images in churches, praying towards the east, crossing and other devout but to them objectionable gestures.[1]

Position taken by the King and Laud in the religious controversy.

In December 1628, at Laud's suggestion, the King had endeavoured to silence all religious controversy by issuing a new edition of the Articles of Religion, prefaced by a Declaration (which is still printed in the Book of Common Prayer) directing that thereafter no man should either in writing or preaching put his own sense or comment as the meaning of the Articles, but should take them in their literal and grammatical sense. He at the same time inferentially repudiated the right of Parliament to deal with religious questions, by declaring that to the King, as Supreme Governor of the Church, and to the Convocation, acting by his leave and with his approval, such matters exclusively belonged. But while professing to act impartially, the King's sympathies were unmistakeably shown not only by his close alliance with Laud, but his ostentatious bestowal of promotion upon those of the clergy who had rendered

[1] Parl. or Const. Hist. iii. 483; Gardiner, Pers. Gov. of Ch. I., i. 87.

themselves notorious, and incurred the animosity of the House of Commons, by their simultaneous advocacy of anti-Calvinistic doctrines in the Church and of the Divine right of kings in the State. Dr. Montague, whose *Appello Caesarem* in 1625 had been condemned by the Commons as containing matters contrary to the Thirty-nine Articles, and who in 1627 had been foremost in inculcating the duty of paying the forced loan, was promoted by the King to a bishopric shortly after the prorogation of Parliament in 1628; and at the same time Dr. Mainwaring, who had but recently been impeached by the Commons and condemned by the Lords for his advocacy, in the pulpit and the press, of the right of the King to tax his subjects without the consent of Parliament,[1] was rewarded with a rich living, and ultimately advanced to the bishopric of St. David's. The idea of Toleration and Religious liberty was as yet unthought of by either King or Parliament, and the Commons, having declared their interpretation of the Articles of religion to be the only true one, proceeded to summon the authors of the ceremonial innovations to answer at the bar of the House.

Toleration unthought of by King, or Parliament.

In the meantime the question of tonnage and poundage was again taken up, and, contrary to the advice of Pym, who wished the matter to be dealt with on the broad national basis of the illegality of taxation without consent, the Commons resolved to give prominence to the breach of privilege in Rolle's case, and accordingly summoned the custom-house officers who had seized that Member's goods to appear and answer for their contempt. The King refused to allow his officers to be questioned for obedience to his orders, and directed the House to adjourn for a few days until the 2nd of March.[2] During the short recess attempts were made to come to some private arrangement with the leaders of the Commons, but these failing, the House, at its re-assembling on March 2, was informed by

Question of tonnage and poundage resumed.

The officers who had seized Rolle's goods summoned.

The King refuses to allow them to be questioned, and orders the House to adjourn.

[1] *Supra*, p. 543, *n.*
[2] Gardiner, Pers. Gov. of Ch. I., i. 89.

A further adjournment ordered.

the Speaker, Sir John Finch, that the King again required them to adjourn, this time to the 10th. The right of the King to order an adjournment, which had always been admitted by the Lords in reference to their own house, had never been acquiesced in by the Commons, who, while complying with the King's wishes, had always been careful to make their adjournment their own formal act. When the question of adjournment was now put by the Speaker, a chorus of Noes resounded from every side. Sir John Eliot, who, anticipating the adjournment and speedy dissolution of Parliament by the King, had prepared a protestation on the subjects of religion and taxation, which, if only passed by the House before its adjournment, would go forth to the country as an appeal against the King's arbitrary proceedings, rose to speak. He was interrupted by the Speaker, who, saying he had the absolute command of the King to leave the chair if any one should attempt to address the House, rose also, but was at once thrust back into his seat by Holles and Valentine. The whole House was now in an uproar. Some of the Privy Councillors present rushed to the assistance of the Speaker, who broke away for a moment, but only to be again seized and forced into the chair. 'God's wounds,' exclaimed Holles, 'you shall sit till we please to rise.' At the order of the House the door was locked by Sir Miles Hobart, who placed the key in his pocket. Eliot proposed that three resolutions, the substance of which he explained, should be formally put to the vote. Both the Speaker and the clerk refused. A confused and stormy debate ensued, and Eliot, despairing of getting the resolutions passed, had thrown them into the fire, when, just as the King's guard was approaching the House to effect a forcible entry, Holles, who had hastily rewritten the resolutions from memory, read them to the House. They were carried by acclamation, and the House, having voted its own adjournment, the door was thrown open.[1]

The Commons refuse.

Tumult in the House.

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[1] Nicholas' Notes of the Session of 1629; State Papers, Dom. [1628–9, p. 485], cxxxviii. 5, 6, 7. [See note, next page, on these State Papers.—ED.]

The three Resolutions.

The three resolutions declared: (1) that the introducers of innovation in religion, or of Popery, or Arminianism, or other opinions disagreeing from the true and orthodox Church; and (2) all who should counsel or advise the taking and levying of the subsidies of tonnage and poundage, not being granted by Parliament, or should be actors or instruments therein, should be reputed capital enemies to the Kingdom and Commonwealth; and (3) that all merchants or others who should voluntarily pay the said subsidies, should be reputed betrayers of the liberties of England, and enemies to the same.

Parliament dissolved, 10 March, [1628–9].

The House at its rising had adjourned to the 10th of March. On that day the King dissolved Parliament in person, with an angry reference to the 'disobedient carriage of the Lower House,' and a threat that 'the vipers amongst them should meet with their reward.'[1]

[Of the Papers cited p. 576, *n.* 1, No. 5 contains Notes concerning adjournments of the House of Commons by Royal command, extracted out of the Journals of that House: No. 6 is a relation of what passed in the House of Commons on delivering his Majesty's message for adjourning the House, and No. 7 is another account of the same occurrences. The proclamation of 2nd March, 1629, in which Charles announces his intention to dissolve Parliament is couched in language substantially identical with that actually spoken at the dissolution on the 10th March, the grounds alleged for the dissolution being the 'disobedient and seditious carriage of certain ill-affected persons of the House of Commons,' whereby the King and his regal authority and commandment have been 'so highly contemned as our Kingly office cannot bear, nor any former age parallel.' State Papers, *loc. cit.*, No. 2, Proc. Car. I., 203.—Ed.]

[1] Parl. or Const. Hist. viii. 333.

CHAPTER XIV.

THE STUART PERIOD.

II. FROM THE PETITION OF RIGHT TO THE RESTORATION. (1629–1660.)

Determination of Charles I. to govern without a Parliament,

ON the dissolution of his third Parliament, Charles I. appears to have come to a settled determination to overthrow the old Parliamentary Constitution of England by governing, for the future, without the intervention of the National Council, so long as that Council should presume to claim an independent, and, as the representative of the collective Nation in opposition to the individual King, a preponderating, voice in the government of the State.

intimated in a Proclamation, 27 Mar. 1629.

In an arrogant Proclamation, referring to certain false rumours that he was about again to call a Parliament, he announced that 'the late abuse having for the present driven him unwillingly out of that course, he should account it presumption for any to prescribe any time unto him for Parliaments, the calling, continuing, and dissolving of which was always in his own power. He should be more inclinable to meet a Parliament again, when his people should see more clearly into his intents and actions, and when such as had bred this interruption should have received their condign punishment.'[1] Even before the actual dissolution, the King had hastened to take vengeance on the Opposition 'vipers.' Sir John Eliot, Selden, Holles, Long, Valentine, Strode, and other eminent members of the Commons, were summoned before the Council and committed to prison. Against Eliot, Holles, and Valentine an information was filed in the

Imprisonment of Sir John Eliot, Selden, and other members of the Commons.

[1] Rymer, xix. 62 [viii. pt. iii. 36, in the Hague ed.—ED.]

King's Bench. On suing out their writ of *habeas corpus* they were by the King's order removed to the Tower, so as to elude the judgment of the Court. On being required to plead to the information, they demurred to the jurisdiction of the Court on the ground that as their alleged offences had been committed in Parliament, they were not punishable in any other place. This demurrer, which raised the great question of Parliamentary privilege, was overruled; and as the defendants persisted in their refusal to plead, judgment was given that they should be imprisoned during the King's pleasure, and not released until each had given surety for good behaviour and had made submission. In addition, Eliot, as the ringleader, was fined £2,000, Holles, £1,000, and Valentine, £500.[1] Other distinguished leaders of the Opposition had been brought over to the king's side by the gift of office. Sir Dudley Digges was made Master of the Rolls; Noy, Attorney-General; and Littleton, Solicitor-General; Wentworth, created first a baron, then a viscount, and subsequently Earl of Strafford, was made President of the Council of the North, and afterwards Lord Deputy of Ireland.

Some of the Popular party accept office.

Surrounded by these new counsellors, and guided chiefly by the advice of Laud and Wentworth, Charles now entered upon a career of despotism which he maintained for eleven years. This period of Personal government, during which the King governed without the Parliament, was, Constitutionally speaking, as much a Revolutionary period as that during which, later on, Parliament governed without the King. It should always be borne in mind that it was the aggression of Charles which provoked the counter-aggression of the Parliament.

Eleven years of Despotic government. [1629–40.]

To raise a revenue, Charles had recourse to various exactions, many of which were clearly illegal, and nearly

Expedients to raise a revenue.

[1] Eliot died in prison some years afterwards (27 Nov. 1632), universally regarded as a martyr in the cause of liberty. (See *supra*, p. 339, and Forster's Life of Sir John Eliot.) The animosity of Charles was continued even after Eliot's death. He refused permission to transport his body to Port Eliot. 'Let Sir John Eliot,' was the King's reply, 'be buried in the church of that parish where he died.' S. R. Gardiner, Pers. Gov. of Charles I., i. 274.

all odious and vexatious. 'Obsolete laws,' says Clarendon, 'were revived and rigorously executed,' and 'unjust projects of all kinds, many ridiculous, many scandalous, all very grievous, were set on foot.' Tonnage and poundage and other duties were rigorously enforced by the Royal authority alone. Monopolies, abolished by Act of Parliament in the last reign, were re-established and applied to almost every article of ordinary consumption. The ancient prerogative of compelling tenants in chivalry to receive the order of knighthood or pay a fine was revived, and extended to all men of full age seised of lands or rents (by whatever tenure) of the annual value of £40 or more. 'By this expedient,' says Clarendon, 'which, though it had a foundation in right, yet in the circumstances of proceeding was very grievous, the King received a vast sum of money from persons of quality, or of any reasonable condition, throughout the kingdom.'[1] Commissioners were appointed to search out and compound for defects in titles to estates; and an attempt was even made to revive the ancient and odious Forest Laws. Under cover of the rule of law that no length of prescription could be pleaded in bar of the King's title, the boundaries of the Royal forests were so extended that the forest of Rockingham alone was increased from six to sixty miles in circuit at the expense of the neighbouring landowners, who, at the same time, were mulcted in enormous fines for alleged encroachments, some of which were from three to four hundred years' standing.[2] 'This burthen,' says Clarendon, 'lighted most upon people of quality and honour, who thought themselves above ordinary oppression, and were like to remember it with more sharpness.'[3]

Tonnage and poundage.

Monopolies.

Compulsory knighthood.

Inquisition into titles to estates.

Forest laws revived.

Royal Proclamations.

In lieu of Acts of Parliament, Royal Proclamations, more numerous and oppressive than those which had ex-

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[1] Hist. Rebellion, i. 67; *supra*, p. 162.

[2] On this ground Lord Salisbury was fined £20,000; Lord Westmoreland, £19,000; Sir Christopher Hatton, £12,000; Sir Lewis Watson, £4000; and many other persons in smaller amounts.—Strafford's Letters, ii. 117. Cobbett's Parl. Hist. ii. 642.

[3] Clarendon, Hist. i. 16.

cited so much opposition under James I., were issued from time to time and declared to have the force of laws. The Common Law Judges, with a few honourable exceptions, upheld by their decisions the illegal acts of the King; whilst the irregular tribunals, the Courts of Star Chamber and High Commission, by extending their authority and exercising a vigilant and severe coercive jurisdiction whenever the slightest opposition was manifested against the Civil tyranny of the King or the Ecclesiastical tyranny of Laud, maintained for some years what may not unfairly be designated as a Reign of Terror.[1]

Servility of the Judges.

Of the barbarous and tyrannical punishments inflicted by the Court of Star Chamber it will be sufficient to refer to a few only of the more celebrated instances. (1) John Williams, Bishop of Lincoln, who, as a favourer of the Puritans, had excited the enmity of Laud, had received certain letters from Dr. Osbaldiston, the master of Westminster School, wherein some contemptuous nickname was applied to the Archbishop. For concealing (not publishing) this libellous letter, Williams was condemned, in 1637, to pay £5000 to the King, and £3000 to Laud, and to be imprisoned during pleasure. A few days afterwards he was suspended from his office by the High Commission Court. Osbaldiston was adjudged to pay a still heavier fine, to be deprived of his benefices, and to be imprisoned until he should make submission. In addition he was to stand in the pillory, with his ears nailed to it, in front of his school

Punishments inflicted by the Star Chamber.

Case of Bishop Williams and Dr. Osbaldiston.

[1] 'For the better support of these extraordinary ways,' says Lord Clarendon, 'and to protect the agents and instruments who must be employed in them, and to discountenance and suppress all bold inquiries and opposers, the Council-table and Star Chamber enlarged their jurisdictions to a vast extent, "holding (as Thucydides said of the Athenians) for honourable that which pleased, and for just that which profited;" and being the same persons in several rooms, grew both courts of law to determine right, and courts of revenue to bring money into the Treasury; the Council-table by proclamations enjoining to the people what was not enjoined by the law, and prohibiting that which was not prohibited; and the Star Chamber censuring the breach and disobedience to those proclamations by very great fines and imprisonment; so that any disrespect to any acts of State, or to the persons of statesmen, was in no time more penal, and those foundations of right, by which men valued their security, to the apprehension and understanding of wise men, never more in danger to be destroyed.'—Hist. i. 68.

Leighton.

in Dean's Yard.[1] (2) Alexander Leighton, a Scottish divine (whose son afterwards became Archbishop of Glasgow) was sentenced, in 1630, for writing an able but scurrilous book entitled 'An Appeal to Parliament, or Sion's Plea against Prelacy,' to pay a fine of £10,000, to be degraded from orders, to be whipped at Westminster and set in the pillory, to have one ear cut off, one side of his nose slit, and one cheek branded with S.S. (for Sower of Sedition), to have the whole of this repeated the next week at Cheapside, and to suffer imprisonment for life.[2] (3) In 1638, for distributing pamphlets against the Bishops, John Lilburne, a London apprentice, (who afterwards fought with great bravery in the Parliamentary army, and attained the rank of lieutenant-colonel,) was severely whipped from the Fleet to Westminster, set in the pillory, and kept in prison until released three years afterwards by the Long

Lilburne.

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[1] Osbaldiston managed to keep out of the way, but the Bishop was imprisoned until released, with other political prisoners, in 1640.

'Sion's Plea against Prelacy.'

[2] State Tr. iii. 383. 'Sion's Plea' had been elaborated by Leighton out of a petition drawn up by him after the prorogation in 1628, for presentation to Parliament at its next meeting, and to which he obtained five hundred signatures, including those of several members of the House of Commons. It assailed the Bishops in unmeasured terms. They had promised the late King 'absolute liberty to do what he list,' if he would only support their authority. This was not so very far from the truth. But Leighton weakened his case against them as supporters of a Regal autocracy by laying to their charge almost every evil which existed in the world; denouncing them as 'men of blood,' persecuting the saints, 'knobs and wens of bunchy popish flesh,' the 'trumpery of Antichrist.' The 'Plea' was something more, however, than a mere attack on the Bishops. It was an appeal to political Presbyterianism, more especially as represented in the two Houses of Parliament, to remove the evil counsellors of the King, and to resist a dissolution. 'Put the case,' said Leighton (p. 207), 'that the good harmless King be a captivated Joash by Athaliah's Arminianised and Jesuitical crew, or a misled Henry VI., dispossessed of his faithfullest friends and best counsel by the pride of the French; or a Henry III., overawed by a devilish domineering favourite; or an Edward VI., overpoised and borne down from his good purposes to God's glory and the good of the State by the halting and falsehood of the prelates and their Romish confederacies, so that such a King, though he held the sceptre, neither can be free himself nor execute his designs because the sons of the men of sin are too hard for him.' 'The great Council of State,' he continued (p. 240), 'must remove the wicked from the head, and take away the corrupting and corroding dross from the silver excellency and excellent argentry of the King . . . Strike neither at great nor small, but at these troublers of Israel. Smite that Hazael in the fifth rib.' In conclusion he invited Parliament to resist a dissolution, asserting (p. 337) that it was the duty of its members to stay in the ship, and that 'every dissolution of Parliament without real information is against right, reason, and record.' Gardiner, Pers. Gov. of Charles I., i. 177–180.

Prynne, Burton, and Bastwick.

Parliament. (4) But the case which excited the greatest popular indignation was that of Prynne, Burton, and Bastwick, who were together brought before the Star Chamber in 1637. William Prynne, a barrister of Lincoln's Inn, of great learning, but a bigoted Puritan, had already suffered, in 1633, for publishing a ponderous tome of 1000 pages, entitled 'Histriomastix,' condemning stage-plays, May-games, and similar diversions. Unfortunately for Prynne the Queen, about ten weeks after the printing of this book had been completed, took part in a masque at Court. A passage reflecting in the strongest terms on female actors was now, unfairly as he contended, alleged to be an intentional insult to Her Majesty;[1] and Prynne was condemned to stand twice in the pillory, to lose both ears, to pay a fine of £5000, to be degraded from the Bar and at his University (Oxford), and to be imprisoned until he should make entire submission. While in prison he managed to elude the prohibition of pen, ink, and paper, and published some fresh works in defence of his principles which caused him to be now again brought before the Star Chamber. The offence of Henry Burton, a London rector, was the publication of two sermons, and also a pamphlet entitled 'News from Ipswich,' containing charges of Romish innovations against Wren, Bishop of Norwich.[2] John Bastwick, a physician of Colchester, and formerly of Emmanuel College, Cambridge, was already, like Prynne, undergoing punishment for a former offence. Some years previously he had published a

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[1] Prynne denied any reference to the Queen, and argued that she could not have been aimed at in a publication the last proof-sheets of which had been corrected ten weeks before she acted in the court masque. But it appears by the newsletters of Salvetti, the Florentine agent, that the intention of the Queen to act was known about the time Prynne was completing his proof, and the offending passage appears on the last page of the book then under revision. See Gardiner, Pers. Gov. of Ch. I., ii. 36.

[2] [Green, *Hist. Eng. People*, iii. 181, notes that Burton called on all Christians to resist the Bishops as 'robbers of souls, limbs of the beast, and factors of Antichrist.' This is rather stronger language than the text indicates, and no doubt constituted an incitement to disturbances which it would have been hard to distinguish from rebellion, and it is scarcely to be wondered at that Laud should have included Burton among the 'trumpets of sedition.' It seems somewhat curious that Green should apparently class Prynne, Burton, and Bastwick together, *op. cit.*, iii. 182, as 'silly zealots.'—ED.]

Latin work called *Elenchus Papismi et Flagellum Episcoporum,* in answer to a book written by one Short, a papist, in support of his religion. For this he was sentenced by the High Commission Court to a fine of £1000, to be debarred his practice of physic, to be excommunicated, and imprisoned until he should make recantation. While in gaol he published a defence of himself and an acrimonious attack upon his prosecutors, and for this publication he was summoned, at the same time as Prynne and Burton, before the Star Chamber. It was at first intended to proceed against the three for high treason, but the Judges, on being consulted, had the courage to declare that their libels against the Bishops did not amount to treason. The accused were all fined £5000 each, condemned to the pillory, to lose their ears, to be branded on both cheeks, and to be imprisoned for life, without access to kindred or friends, and without books or writing materials. The sentence was executed in the most savage manner; the stumps of Prynne's ears, which had been mercifully spared by the hangman on the former occasion, being now pared off so closely as to endanger his life. So great was the sympathy expressed for them in London, and even in some country districts, that the Council deemed it prudent to send Prynne to Jersey, Burton to Guernsey, and Bastwick to Scilly, where they remained in close confinement until released by order of the Long Parliament.[1]

Case of Ship Money.

Shortly before these proceedings against Prynne, a decision had been pronounced by the Exchequer Chamber, in the famous case of Ship-money,[2] by which the whole property of the English people was placed at the disposal of the Crown.

The idea of ship-money originated in the 'venal diligence and prostituted learning' of Sir William Noy, the

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[1] Brodie, Hist. Brit. Empire, ii. 334. Several other instances of the merciless punishments inflicted by the Star Chamber are enumerated in the 4th chapter of Mr. Brodie's 2nd vol.

[2] [See the Case and Note in Denman's Broom's *Const. Law*, pp. 303–405.—ED.]

Attorney-General. Among the records in the Tower he had found ancient writs compelling the sea-ports and even maritime counties to provide ships for the use of the King: and upon these precedents he devised a plan by which a large fleet might be procured without any additional charge upon the revenue. In October, 1634, writs were issued to the magistrates of London and other ports ordering them to provide a certain number of ships of war of a specified tonnage and equipage, to be ready at Portsmouth on the 1st of March, and empowering them to assess all the inhabitants, according to their substance, for the sum requisite for the fitting out and maintenance of the ships and their crews for the period of six months.[1]

First writ of ship-money, 20 Oct. 1634.

Notwithstanding the remonstrances of London,[2] and some other towns, obedience to these 'new writs of an old edition' was enforced by the imprisonment of such persons as refused to pay their share of the assessment, and the experiment proved a great temporary success. 'In this way,' wrote the Venetian ambassador to his government, 'did this most important affair begin and end. If it does not altogether violate the laws of the realm, as some think it does, it is certainly repugnant to usage and to the forms hitherto observed.'[3] In effect, the levying of ship-money was the imposition of a 'tax;' for the ships specified in the writs were of such a size as to render it impossible for any port in the kingdom (except London) to furnish them in kind as formerly, and the demand resolved itself into a demand for so much money. It was therefore, in its essence, a distinct violation of the Petition of Right, notwithstand-

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[1] Rushworth, ii. 257.

[2] The Lord Mayor was summoned before the Council, reprimanded, and ordered to return and bring his fellow-citizens to a better frame of mind. The City lawyers were then sent for and told 'to take heed how they advised the City in a case so clear for the King.' They objected that the guardianship of the seas was already provided for by Tonnage and Poundage. 'It is true,' replied the Earl of Manchester with supercilious arrogance (or sophistic special pleading), 'this writ hath not been used when Tonnage and Poundage was granted. Now it is not [granted], but taken by prerogative, therefore this writ is now in full force.' Gardiner, Pers. Gov. of Ch. I., ii. 89.

[3] *Ibid.* ii. 290.

ing the show of precedent in its favour. We now know that the fleet was being prepared in furtherance of a secret Treaty which Charles had been negotiating, the ultimate object of which was the overthrow of the Dutch Republic and the division of its soil between Spain and England.[1] But there was also a real foundation for the pretext for arming with which the King endeavoured to hoodwink the nation, and even his own Council, in the evident necessity at the time for a powerful fleet to repress as well the depredations of the Algerine pirates, who had become bold enough to infest the coasts both of England and Ireland, as the boldness of the Dutch, who had taken advantage of the naval weakness of England to dispute the ancient claim of the English Crown to the dominion of the Narrow Seas.[2]

Second writ of ship-money, 4 Aug. 1635.

Noy died soon after suggesting the expedient of ship-money, but the Lord Keeper Finch improved upon the original scheme by advising an extension of the writs from the sea-ports to the whole kingdom. Clarendon admits that this tax was intended not merely for the support of the navy, but 'for a spring and magazine that should have no bottom, and for an everlasting supply of *all* occasions.'[3] Writs were accordingly sent to the Sheriff of every county in England and Wales ordering him to provide a ship of war of a prescribed tonnage, armed and equipped for the King's service; but as it was never intended that an actual ship should be provided, instructions were sent with each writ commanding the Sheriff, instead of a ship, to levy upon his county a specified sum of money, and return the same to

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[1] Clarendon, State Papers, i. 109, 112, 126.

[2] It was to uphold these claims of the Dutch that Grotius wrote his celebrated *Mare Liberum*, which was answered by Selden in his *Mare Clausum*, proving that sovereignty over the Narrow Seas had been exercised by England from the earliest times. [Mr. Lawrence, late Deputy Whewell Professor of International Law in the University of Cambridge, has well shewn, in an article in the *Law Magazine and Review*, No. ccli., for February, 1884, reprinted in his *Essays On Some Disputed Questions in Modern International Law* (1884–5), that 'the famous *Mare Clausum* and *Mare Liberum* controversy has ended by the victory of the advocates of *Mare Liberum* all along the line.'—ED.]

[3] Hist. i. 68.

the Treasurer of the Navy for his Majesty's use, with directions to enforce payment by compulsory process. The collection of the money met with a good deal of resistance in the country. The chief-constables of the Hundred of Bloxham, Oxfordshire, replied to the warrant from the Sheriff of the county directing the assessment, that they had 'no authority to assess or tax any man,' and that they did not conceive the warrant gave them any power to do so. Ultimately the Sheriff was obliged to make the assessment himself. Similar difficulties occurred also in Essex and Devonshire. In some places the incumbents, churchwardens, and overseers utterly refused to produce their books. When cattle were distrained in default of payment no purchasers could be found, and the Council found it necessary to direct them to be sent to London for sale by the King's officers.[1]

Resistance to the collection.

Richard Chambers, a London merchant, who had already suffered for his resistance to the imposition of Tonnage and Poundage, brought an action in the King's Bench against the Lord Mayor for imprisoning him on refusal to pay the assessment. The defendant pleaded the King's writ as a special justification, and the Judges refused even to allow the question of right to be argued, Berkeley, one of their number, declaring that 'there was a rule of law and a rule of government, and that many things which might not be done by the rule of law might be done by the rule of government.'[2]

The issuing of a third writ of ship-money, affecting, like its immediate predecessor, the whole of England, made it but too clear that it was the King's intention to retain this innovation as a permanent tax, to be levied at his pleasure without the consent of the nation. The opposition to the writs, hitherto restricted to particular localities, now assumed a general aspect, and was taken up by men of the highest rank and of undoubted loyalty. The Earl of Danby (Henry

Third writ of ship-money, 9 Oct. 1636.

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[1] Gardiner, Pers. Gov. ii. 190, 191, 201, 202.
[2] Rushworth, ii. 323.

Danvers), an old servant of the Crown, wrote to the King, warning him of the universal discontent of his subjects. The new levies of money, he said, were repugnant to the fundamental laws of England, and to the privileges which their ancestors and they themselves had till the present time enjoyed. It was of the manner in which the money was raised, not of the amount, that they complained. The only way for the King to give satisfaction to his subjects was by summoning Parliament.[1] The Earl of Warwick (Robert Rich) addressed him in much plainer language, and several peers drew up a protestation to the King which, however, does not appear to have been actually presented.[2] But Charles had no intention either of calling a Parliament or of desisting from the exaction of the obnoxious tax, which produced an annual revenue of over £200,000. The people murmured, but were obliged to yield to the overbearing power of the Crown. Several attempts were made to raise the question of the legality of the levy in the Courts of Law, but the Crown always found means to elude the discussion. At length, in 1637, John Hampden, a gentleman of ancient family and good estate in Buckinghamshire, succeeded in obtaining a Judicial decision upon the point of law. Having refused to pay the sum of 20*s.* assessed upon a portion of his estate,[3] proceedings were instituted against him in the Exchequer, to which he appeared and demurred to the writ as insufficient in law. 'Till this time,' says Clarendon, 'he was rather of reputation in his own country than of public discourse of fame in the kingdom: but then he grew the argument of all tongues, every man inquiring who and what he was that durst, on his own charge, support the liberty and prosperity of the kingdom.'[4] The King awaited the decision

Hampden's refusal to pay.

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[1] Gardiner, Pers. Gov. ii. 315.

[2] Gardiner, Pers. Gov. ii. 316.

[3] The sum of 20*s.* was assessed on lands in Great Missenden, and another sum of 31*s.* 6*d.* on his lands in Great Kimble.

[4] Hampden, who was a cousin of Oliver Cromwell, had sat in Charles's first three Parliaments. For refusing to contribute to the general loan in 1626, on the ground that 'he feared to draw upon himself that curse in Magna Charta

of the Judges with confidence. Some time previously he had privately submitted to them the following questions: (1) 'When the good and safety of the kingdom in general is concerned and the whole kingdom is in danger; whether may not the King, by writ under the Great Seal of England, command all the subjects of this kingdom, at their charge, to provide and furnish such number of ships, with men, victuals, and munitions, and for such time as he shall think fit, for the defence and safeguard of the kingdom from such danger and peril; and by law compel the doing thereof in case of refusal or refractoriness? (2) And whether, in such case, is not the King sole judge, both of the danger, and when and how the same is to be prevented and avoided?' The Judges (with the exception of Croke and Hutton, who, however, subscribed their names on the principle that the judgment of the majority was that of the whole body) answered both questions in favour of the prerogative: and this extra-judicial opinion was by the King's order publicly read in the Star Chamber, and enrolled in all the courts at Westminster.[1]

Extra-judicial opinions of the Judges, 7 Feb. 1637.

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which should be read twice a year against those that do infringe it,' he was committed to prison, but regained his freedom in time to be re-elected to the Parliament of 1628. In the Long Parliament he sat for Buckinghamshire, and on the breaking out of the Civil War, took a colonel's commission in the Parliamentary army. He died 24th June, 1643, of wounds received in a skirmish at Chalgrove, near Oxford, six days previously. [Green, *Hist. Eng. People*, iii. 175-7, gives a picturesque account of Hampden's early life and home surroundings in his 'Elizabethan hall girt round with galleries and stately staircases,' on a rise of the Chilterns, and points out how the ability which he shewed when he took his seat in the 'memorable Parliament' of 1620, at once 'carried him to the front,' so that he is found 'managing conferences with the Lords,' and the friend of Eliot and of Pym. By a curious misprint, Green has 'Stave' for Stowe, in describing the Sheriff of Buckinghamshire, 1635–6, Sir Peter Temple of Stowe, who had the writ for assessing Shipmoney on his County.—ED.]

[1] The opinion of the Judges was twice taken by the King: first, in Dec. 1635, shortly after the issue of the second writ, and again more formally in Feb. 1637. Their answers were practically the same on both occasions. On their last opinion Strafford wrote: 'Since it is lawful for the King to impose a tax towards the equipment of the navy, it must be equally so for the levy of an army; and the same reason which authorises him to levy an army to resist will authorise him to carry that army abroad, that he may prevent invasion. Moreover, what is law in England is law also in Scotland and Ireland. *This decision of the judges will therefore make the King absolute at home* and formidable abroad. Let him only abstain from war a few years, that he may habituate

Arguments on the case.

During twelve days the great case was argued in the Exchequer Chamber, by the celebrated Oliver St. John and Mr. Holborne as counsel for Hampden, by the Attorney-General Bankes and the Solicitor-General Littleton on behalf of the Crown. On the part of Hampden it was maintained :—

(i.) That the Law and Constitution of England had provided certain known and undoubted means for the defence of the realm whether by sea or land. (*a*) The military tenures of land bound a large part of the kingdom to a stipulated service at the charge of the holders. The Cinque Ports also, and some other towns held by an analogous tenure, were bound to furnish a quota of ships or men in return for the special privileges which they enjoyed. (*b*) In addition to these services in kind for defence by land and sea, things coming to the King by prerogative, as the profits arising from the feudal tenures, and various other emoluments received in right of the Crown, were applicable so far as they would extend to the public use. (*c*) The King, moreover, had been specially provided with particular supplies of money for defence of the sea in time of danger, as the customs on wool and leather, tonnage and poundage. With regard to the legality of the modern Impositions, far in excess of the ancient use, Mr. St. John said he did not intend to speak: 'for in case his Majesty may impose upon merchandise what himself pleaseth, there will be less cause to tax the inland counties; and in case he cannot do it, it will be strongly presumed that he can much less tax them.'

(ii.) When these ordinary revenues proved insufficient, the Constitution had provided other sufficient and lawful means—viz., aids and subsidies granted in Parliament. To these the Kings of England had at all times habitually had recourse. 'For as,' said St. John, 'without the assistance

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his subjects to the payment of this tax, and in the end he will find himself more powerful and respected than any of his predecessors.'—Strafford Papers, ii. 61. [For the answers of the Judges, cf. Denman's Broom's *Const. Law*, p. 306.—ED.]

of his judges, his Majesty applies not his laws, so neither without the assistance of his great council in Parliament can he impose.' The fact that our Kings also obtained supplies of money by loans on promise of repayment, or by Benevolences which were in the nature of alms from their subjects, afforded additional proof that they possessed no prerogative of general taxation. It is rare in a subject, and more so in a prince, to ask and take that as a gift, which he may and ought to have of right.

(iii.) But the most conclusive and irrefutable argument was founded on the long series of statutes, concluding with the recently granted Petition of Right, by which, in most emphatic language, it was provided that no tax should be levied on the subject without the consent of Parliament.

(iv.) As to the precedents alleged on the Crown side, it was answered that most or of all of them applied to sea-towns and havens; and that it appeared that the inland counties had not so much as *de facto* been usually charged for ships. But even if precedents could be adduced, they could not be upheld in the teeth of so many statutes. The question was not what had been done *de facto*, for many things had been done which were never allowed, but what had been done, and might be done *de jure*. *Judicandum est legibus non exemplis.*

(v.) Lastly, admitting that in a case of over-ruling necessity, as of actual invasion, or its immediate prospect, not only the Sovereign, but each man in respect of his neighbour, might do many things absolutely illegal at other seasons, yet in the present case there was no overwhelming danger; the nation was at peace with all the world; and it would be absurd to reckon the piracies of a few Turkish corsairs among those instant perils for which a Parliament would provide too late.

Judgment for the Crown.

The twelve Judges took some time for deliberation, and delivered their judgments during the three next terms, four in each term. Seven pronounced in favour of the Crown, and five in favour of Hampden; so that the majority

against him was the least possible. Of the five who decided for Hampden, three based their judgments upon merely technical grounds peculiar to his particular case: but the other two, Croke and Hutton, boldly denied the right claimed by the Crown, without the smallest qualification. The elaborate and learned judgment of Sir George Croke[1] was grounded upon the following reasons: 1st. That the command by the King's writ to have ships at the charge of the inhabitants of the county was illegal and contrary to the Common Law, not being by authority of Parliament. 2ndly. That if at the Common Law it had been lawful, yet this writ was illegal, being expressly contrary to divers statutes prohibiting a general charge to be laid upon the Commons without consent in Parliament. 3rdly. That it was not to be maintained by any prerogative, nor allegation of necessity or danger. 4thly. Admitting it were legal to lay such a charge upon maritime ports, yet to charge any inland county, as the county of Bucks, for making ships, and furnishing them with mariners, &c., was illegal, and not warranted by any precedent. On the other hand, several of the Judges who pronounced for the Crown, finding it almost impossible to elude the force of the numerous prohibitory statutes, rested their decision upon the intrinsic Absolute authority of the King, and the inability of Parliament to limit the high prerogative of the Crown. Mr. Justice Crawley said: 'This imposition without Parliament appertains to the king originally, and to the successor *ipso facto*, if he be a sovereign in right of his sovereignty from the crown. You cannot have a king without these royal rights.' 'Where Mr. Holborne,' said Mr. Justice Berkeley, 'supposed a fundamental policy in the creation of the frame of this kingdom, that, in case the monarch of England should be inclined to exact from his subjects at his pleasure, he should be restrained, for that he could have nothing from them, but upon a common consent

[1] [See Croke's Judgment, in Denman's Broom's *Const. Law*, pp. 338–55, where it is followed by that of Finch, C.J., *contra*.—ED.]

in parliament; he is utterly mistaken therein. The law knows no such king-yoking policy. The law is itself an old and trusty servant of the king's; it is his instrument or means which he useth to govern his people by: I never read nor heard that lex was rex; but it is common and most true that rex is lex.' 'The king, *pro bono publico*,' said Vernon, another Judge, 'may charge his subjects, for the safety and defence of the kingdom, notwithstanding any act of parliament, and a statute derogatory from the prerogative doth not bind the king: and the king may dispense with any law in cases of necessity.' Sir John Finch, Chief Justice of the Common Pleas, who had himself advised the extension of the writs of ship-money to inland counties, followed in the same strain: 'No act of parliament,' he said, 'can bar a king of his regality, as that no land should hold of him, or bar him of the allegiance of his subjects or the relative on his part, as trust and power to defend his people: therefore acts of parliament to take away his royal power in the defence of his kingdom are void; they are void acts of parliament to bind the king not to command the subjects, their persons, and goods, and I say their money too; for no acts of parliament make any difference.' [1]

Effect of this Judgment.

Charles had little cause for rejoicing at the legal decision in his favour. Its only effect was to make Hampden the most popular man in England, and to strengthen and widely extend the public indignation. 'It is notoriously known,' says Lord Clarendon, 'that pressure [ship-money] was borne with much more cheerfulness before the judgment for the King than ever it was after; men before pleasing themselves with doing somewhat for the King's service, as a testimony of their affection, which they were not bound to do, many really believing the necessity, and therefore thinking the burthen reasonable; others observing that the advantage to the King was of importance, when

[1] 3 St. Tr. 825; Hallam, Const. Hist. ii. [21, 22].

the damage to them was not considerable, and all assuring themselves that when they should be weary or unwilling to continue the payment, they might resort to the law for relief, and find it. But when they heard this demanded in a court of law, as a right, and found it, by sworn judges of the law, adjudged so, upon such grounds and reasons as every stander-by was able to swear was not law, and so had lost the pleasure and delight of being kind and dutiful to the King, and instead of giving were required to pay, and by a logic that left no man anything which he might call his own; they no more looked upon it as the case of one man, but the case of the kingdom, nor as an imposition laid upon them by the King, but by the judges, which they thought themselves bound in conscience to the public justice not to submit to. It was an observation long ago, by Thucydides, "that men are more passionate for much injustice than for violence, because," says he, "the one coming as from an equal seems rapine, when the other, proceeding from one stronger, is but the effect of necessity." So, when ship-money was transacted at the Council Board, they looked upon it as a work of that power they were all obliged to trust, and an effect of that foresight they were naturally to rely upon. Imminent necessity and public safety were convincing persuasions; and it might not seem of apparent ill-consequence to them, that upon an emergent occasion the royal power should fill up an hiatus, or supply an impotency in the law. But when they saw in a court of law (that law that gave them title to, and possession of, all that they had) reason of state urged as elements of law, judges as sharp-sighted as secretaries of state, and in the mysteries of state; judgment of law grounded upon matter of fact, of which there was neither inquiry nor proof, and no reason given for the payment of the thirty shillings in question, but what included the estates of all the standers-by; they had no reason to hope that doctrine, or the promoters of it, would be contained within any bounds, and it was no wonder that they, who had so little reason to be pleased with their own condition, were no less solicitous for,

or apprehensive of, the inconveniences that might attend any alteration.

'And here the damage and mischief cannot be expressed that the Crown and State sustained, by the deserved reproach and infamy that attended the judges, by being made use of in this and like acts of power; there being no possibility to preserve the dignity, reverence, and estimation of the laws themselves, but by the integrity and innocency of the judges. And no question, as the exorbitancy of the House of Commons, in the next Parliament, proceeded principally from their contempt of the laws, and that contempt from the scandal of that judgment: so the concurrence of the House of Peers in that fury, can be imputed to no one thing more than to the irreverence and scorn the judges were justly in, who had been always before looked upon there as the oracles of the law, and the best guides to assist that House in their opinions and actions. And the Lords now thought themselves excused for swerving from the rules and customs of their predecessors (who, in altering and making of laws, in judging of things and persons, had always observed the advice and judgment of those sages), in not asking questions of those whom they knew nobody would believe; thinking it a just reproach upon them (who, out of their councilship, had submitted the difficulties and mysteries of the law to be measured by the standard of what they called general reason, and explained by the wisdom of state) that they themselves should make use of the licence, which the others had taught them, and determined that to be law which they thought to be reasonable, or found to be convenient. If these men had preserved the simplicity of their ancestors, in severely and strictly defending the laws, other men had observed the modesty of theirs, in humbly and dutifully obeying them.'[1]

The Scottish rebellion.

It was not long after the condemnation of Hampden that Charles entered upon his rash and unwise attempt

[1] Hist. Rebell. i. 69.

to change the Ecclesiastical position in Scotland, and to force upon the people of that kingdom a Liturgy which the great body of them regarded with fanatic abhorrence.[1] The Scots, having drawn up and signed their celebrated Covenant (March, 1638), at length took up arms in defence of their Religious freedom. By the ignominious pacification of Berwick (18th June, 1639), the contest was only adjourned, and both sides almost immediately began to prepare for a renewal of the war. In this emergency, the real impotence of the King's arbitrary system of government became apparent. The illegal methods of supply so long practised proved utterly inadequate for the support of an army, and the King, after eleven years of despotic rule, most reluctantly yielded to the advice of his Council and issued writs for a Parliament which met on the 13th April, 1640.

Distress of the Government.

Fourth (the Short) Parliament. 1640. April 13—May 5.

Its moderation and loyalty.

It is remarkable that the House of Commons which met after so long a period of arbitrary misgovernment was admitted on all sides to be one of the most moderate and loyal assemblies which had been known for many years. 'The House generally,' says Clarendon, 'was exceedingly disposed to please the King and to do him service. It could never be hoped,' he remarks elsewhere, 'that more sober or dispassionate men could ever meet together in that place, or fewer who brought ill purposes with them.'[2] Charles pressed for an ample and immediate supply, and

Charles demands an immediate supply.

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[1] [The position of Ecclesiastical affairs in Scotland was at this time curious, if not anomalous. There was, technically, a Hierarchical government of the Established Church by means of duly consecrated Bishops for the ancient Dioceses of Scotland, and there was even a new Diocese formed, that of Edinburgh, but Episcopal collation to benefices seems to have been the main link which connected the Church with Episcopacy, and the use of Liturgical forms, which, of course, are not of the essence of Episcopacy, appears to have been either confined to the service conducted by the Reader, preparatory to the Parish Minister's service, or to the use of the Lord's Prayer, the Psalms, and the Doxology. On these points, much interesting information may be found in Beveridge's *Culross and Tulliallan*, and Davidson's *Inverurie and Earldom of the Garioch*, and on the situation after the Disestablishment of Episcopacy in 1689, in Walker's *Life and Times of Rev. John Skinner of Linshart*. In the present day, there seems to be rather a move in favour of Liturgical worship, among an influential section, at least, of the clergy of the Scottish Establishment.—ED.]

[2] Clarendon, Hist. i. 139.

pledged his word that if the Commons would gratify him with the dispatch of this matter, he would give them time enough afterwards to represent any grievances to him. But the Commons, led by Pym and Hampden, and mindful how shamefully the Royal word had been already violated, shewed a thorough determination to have their accumulated grievances redressed before voting supplies. They declared that the conduct of the Speaker on the last day of the former Parliament, in refusing, at the alleged command of the King, to put the question; and the prosecution and imprisonment of Eliot, Holles, and Valentine, for their behaviour in Parliament, were breaches of privilege. The proceedings against Hampden in the Case of Ship-money were inquired into by a Committee and reported matter of grievance: and the various other illegal proceedings during the long discontinuance of Parliament were discussed in detail. 'Let us not stand too nicely upon circumstances,' said Edmund Waller; 'let us do what may be done with reason and honesty on our part to comply with the King's desires. But let us first give new force to the old laws for maintaining our rights and privileges, and endeavour to restore this nation to its fundamental and vital liberties,—the property of our goods, and the freedom of our persons. The kings of this nation have always governed by Parliaments; but now divines would persuade us that a monarch must be absolute, and that he may do all things *ad libitum*. Since they are so ready to let loose the conscience of the King, to enterprise the change of a long-established government, we are the more carefully to provide for our protection against this pulpit-law—by declaring and re-enforcing the municipal laws of the kingdom.'[1]

The Commons insist on redress of grievances.

Speech of Edmund Waller.

With this object, a Committee was appointed to confer with the Peers on a long list of grievances divided, by the advice of Pym, into the three heads of innovations in

Committee to confer with the Lords on grievances.

[1] Parl. or Const. Hist. viii. 441.

A question of privilege.

religion, invasions of private property, and breaches of the privileges of Parliament. Impatient at the delay, Charles had recourse to the interposition of the Lords. They voted that in their opinion 'the supply should have precedency, and be resolved upon before any other matter whatsoever,' and in a conference communicated this resolution to the Commons. The latter at once voted this a high breach of their privileges, which the Lords answered by a disclaimer of any intention to interfere with the undoubted right of the Commons, admitting that 'the bill of subsidies ought to have its inception in your House; and that when it comes up to their lordships, and is by them agreed to, it must be returned back to you, and be, by your Speaker, presented.'[1]

Exclusive right of Commons to initiate Money-Bills.

Amendments to Money-Bills by the Lords.

[1] Besides the exclusive right of initiating Money-Bills, the Commons also maintained that such Bills should not be amended by the Lords. In 1671, they successfully disputed the right of the Lords to reduce the amount of an imposition; and since that year the Lords have tacitly acquiesced in the contention of the Commons. Whenever amendments have been made which the Commons were desirous of adopting, they have invariably saved their privilege by throwing out the amended Bill and sending up a fresh Bill embodying the Lords' amendments. But while abstaining from direct interference with grants of supply, the Lords occasionally, without objection from the Lower House, rejected or postponed other Bills incidentally affecting supply and taxation, such as Bills for the regulation of trade and for imposing or repealing protective duties. When, however, in 1790, they amended a Bill for regulating Warwick Gaol, by shifting the proposed rate from the owners to the occupiers of land, the Commons vindicated their privilege by throwing out the Bill. The right of the Lords to reject a Money-Bill, 'to pass all or reject all, without diminution or alteration,' was explicitly admitted by the Lower House in 1671 and 1689; but as the exercise of this right involved the withholding supplies from the Crown, the Lords were loth to avail themselves of it, and, unable to exercise any control, ceased for the most part even to discuss financial measures. When, in 1763, they opposed the third reading of the Wines and Cider Duties Bill, it was observed that this was the first occasion on which they had been known to divide upon a Money-Bill. At length, in 1860, the Lords exercised their legal right of rejection, 'in a novel and startling form,' by rejecting a Bill for the repeal of the paper-duty, after Bills for the increase of the property-tax and stamp-duties, intended to supply the deficiency which would be caused by such repeal, had already received the Royal assent. The legal right of the Lords to reject any Bill whatever was indisputable; and this particular Bill had encountered stormy opposition in the Lower House, where it was only carried by a majority of nine. 'Yet it was contended,' observes Sir Erskine May, 'with great force, that to undertake the office of revising the balances of supplies and ways and means—which had never been assumed by the Lords during two hundred years—was a breach of constitutional usage, and a violation of the first principles upon which the privileges of the House are founded. If the letter of the law was with the Lords, its spirit was clearly with the Commons.' After the lapse of six weeks, during which a Committee of the

Charles offers to give up ship-money for twelve subsidies.

In the meantime the King sent a message to the Commons, offering, if they would grant him twelve subsidies (about £850,000), payable in three years, to give up the prerogative of ship-money. But the Commons were by no means inclined to purchase that which they justly claimed as their right. Many observed 'that they were to purchase a release of an imposition very unjustly laid upon the kingdom, and by purchasing it, they should upon the matter confess it had been just; which no man in his heart acknowledged;' and therefore wished 'that the judgment might be first examined, and being once declared void, what they should present the King with would appear a gift and not a recompense.'[1] The message was, however, taken into favourable consideration, and the Commons were on the point of deciding that a supply should be granted to the King, leaving the amount and the manner for subsequent consideration, when Sir Henry Vane, Secretary of State, told them that if the supply were not voted in the amount and manner proposed in the King's message, it would not be accepted. This caused an adjournment of the debate, and the next day the King angrily dissolved

The Commons decline to purchase immunity from an illegal imposition.

Imprudent speech of Mr. Secretary Vane.

Parliament dissolved after three weeks' session, 5 May, 1640.

Commons had searched for precedents and reported to the House, Lord Palmerston, on the part of the Government, addressed the House, deprecating a collision with the Lords, and expressing his opinion that, in rejecting the Paper Duties Bill, they had been actuated by motives of public policy merely, without any intention of entering upon a deliberate course of interference with the peculiar functions of the Commons; adding, however, that should that appear to be their intention, the latter would know how to vindicate their privileges, if invaded, and would be supported by the people. He concluded by proposing three resolutions, which were passed by the House: (1) 'That the right of granting aids and supplies to the Crown is in the Commons alone;' (2) That, although the Lords had sometimes exercised the power of rejecting Bills relating to taxation, yet the exercise of that power was 'justly regarded by this House with peculiar jealousy, as affecting the right of the Commons to grant supplies and to provide the ways and means for the service of the year;' and (3) That to secure to the Commons their rightful control over taxation, 'this House has in its own hands the power so to impose and remit taxes, and to frame bills of supply, that the right of the Commons as to the matter, manner, measure, and time, may be maintained inviolate.' In the following session the Commons effectually prevented a second interference of the Lords, by including the repeal of the paper-duty in a general financial measure granting the property-tax, the tea and sugar duties, and other ways and means for the service of the year, which the Lords were constrained to accept.—May, Const. Hist. ii. 104–112.

[1] Clarendon, Hist. i. 136.

Parliament, which had sat only three weeks.[1] 'There could not a greater damp,' says Clarendon, 'have seized upon the spirits of the whole nation than this dissolution caused; and men had much of the misery in view which shortly after fell out. Nor could any man imagine what offence the Commons had given, which put the King upon that resolution. But it was observed that in the countenances of those who had most opposed all that was desired by his Majesty, there was a marvellous serenity; nor could they conceal the joy of their hearts: for they knew enough of what was to come, to conclude that the King would be shortly compelled to call another Parliament, and they were as sure that so many so unbiassed men would never be elected again.'[2]

Effect of the dissolution.

The King resumes his old Despotic courses.

Charles now returned to his old Despotic courses. Several members of the late House of Commons were committed to prison. Forced loans were exacted: fresh monopolies were created. Ship-money was enforced with even greater rigour than before, and the Lord Mayor and Sheriffs of London were prosecuted in the Star Chamber for neglecting to levy it. A new imposition was laid upon the counties, under the name of 'coat and conduct money,' for clothing and defraying the travelling expenses of the recruits whom the King had pressed into his services against the Scots. In order to obtain a grant of six subsidies from the clergy, Convocation was unconstitutionally continued after the dissolution of Parliament, under a fresh Commission authorizing its sittings 'during pleasure,' and empowering it to alter and amend the laws of the Church. It accordingly framed and promulgated a set of Canons which greatly irritated both the political and religious feelings of a great part of the nation. In addition to inculcating the Divine Right of kings, and denouncing the damnable sin of resistance to authority, a new oath 'for the

Convocation continued:

Promulgates a new set of Canons:

A new oath

[1] Hist. i. 138.
[2] *Ibid.* i. 139.

preventing of all innovations in doctrine and government' was appointed to be taken by all clergymen, and all graduates in the Universities, while Separatists of all denominations were subjected to the same penalties as Romish recusants.[1]

for preventing innovations in religion.

In his military operations against the Scots, Charles failed utterly and ignominiously. After the defeat at the ford of Newburn-on-Tyne, the English army, disheartened, undisciplined, and disaffected, had retreated to York, leaving the four northern counties to be possessed by the victors. 'The game of tyranny,' observes Macaulay, 'was now up. Charles had risked and lost his last stake. . . His army was mutinous, his treasury was empty; his people clamoured for a Parliament; addresses and petitions against the government were presented. Strafford was for shooting the petitioners by martial law; but the King could not trust the soldiers. A great council of Peers was called at York, but the King could not trust even the Peers. He struggled, evaded, hesitated, tried every shift, rather than again face the representatives of his injured people. At length no shift was left. He made a truce with the Scots, and summoned a Parliament.'[2]

Failure of military operations against the Scots. 1640, Aug. 28.

Great Council of peers summoned at York.

On the 3rd of November, 1640, met that renowned Parliament 'destined to every extreme of fortune, to empire and to servitude, to glory and to contempt; at one time the sovereign of its sovereign, at another time the servant of its servants;' but which, 'in spite of many errors and disasters, is justly entitled to the reverence and gratitude of all who, in any part of the world, enjoy the blessings of constitutional government.'[3] The elections had proceeded with the utmost excitement throughout England. The Court candidates were rejected on all sides. The exertions of the leaders of the Popular party—of Hampden in particular, who rode from shire to shire exhorting the electors to return

Fifth (the Long) Parliament. Nov. 3, 1640.

Its characteristics.

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[1] Neal, Hist. Purit. ii. 302.
[2] Macaulay, ('Hampden,') [Essays, 1862, i. 461.—Ed.]
[3] *Ibid. loc. cit.* and Works, i. 76.

worthy members[1]—secured an overwhelming majority on the side of the Opposition. 'There was observed,' says Clarendon, 'a marvellous elated countenance in most of the members before they met together in the House; the same men who six months before were observed to be of very moderate tempers, and to wish that gentle remedies might be applied without opening the wound too wide and exposing it to the air, and rather to cure what was amiss than too strictly to make inquisition into the causes and origin of the malady, talked now in another dialect both of things and persons, and said that they must now be of another temper than they were the last Parliament; that they had now an opportunity to make their country happy by removing all grievances and pulling up the causes of them by the roots, if all men would do their duties.'[2]

Speech of Pym on the state of the Kingdom.

The first day on which the House met for business, Pym delivered a long and eloquent speech on the miserable state and condition of the Kingdom, denouncing the many arbitrary proceedings of the Government as 'done and contrived maliciously, and upon deliberation, to change the whole frame, and to deprive the whole nation, of all the liberty and property which was their birthright by the laws of the land, which were now no more considered but subjected to the arbitrary power of the Privy Council, which governed the kingdom according to their will and pleasure.' Of the persons who had contributed their joint endeavours to bring this misery upon the nation, he named the Earl of Strafford as 'one more signal in that administration than the rest, being a man of great parts and contrivance, and of great industry to bring what he designed to pass; a man who, in the memory of many present, had sat in that House an earnest vindicator of the laws, and a most

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[1] [This ride, however, in which Pym accompanied Hampden, was 'hardly needed,' says Green, *Hist. Eng. People*, iii. 195, 'for the summons of a Parliament at once woke the kingdom to a fresh life.' One marked feature of this fresh life, noted by Green, *loc. cit.*, was that 'the Puritan emigration to New England was suddenly and utterly suspended.' The intending emigrants stayed at home, says Winthrop, 'in expectation of a new world.'—ED.]

[2] Clarendon, Hist. i. 171.

zealous assertor and champion for the liberties of the people; but that it was long since he turned apostate from those good affections, and, according to the custom and nature of apostates, was become the greatest enemy to the liberties of his country, and the greatest promoter of tyranny that any age had produced.' It was resolved, with 'an universal approbation and consent from the whole House,' to impeach Strafford of high treason. Pym immediately carried up the message to the bar of the Lords, who, with very little debate, committed the Earl to the custody of the Usher of the Black Rod, there to remain until the Commons should bring in a particular charge against him.[1] That Strafford had been technically guilty of the crime of high treason was a matter of grave doubt, and his execution (12 May, 1641) under a Bill of Attainder, brought in after a lengthy trial had failed to secure the probability of a legal conviction, and passed, amidst popular tumults, by the small majority of seven in a House of Peers which could muster only forty-five votes, has procured for him that sympathy which violence invariably assures to its victims. But there can be no doubt that from the time when he devoted his consummate abilities to the establishment of that Despotic system of government which he emphatically termed 'Thorough,' he became and continued a most formidable enemy to his country's freedom. However unsatisfactory in a purely legal point of view, the hesitating opinion of the Judges may be taken as truly expressing at least his moral guilt, when they declared that he 'deserved to undergo the pains and forfeitures of high treason by law.'[2] The impeachment of Strafford was followed up by that of Archbishop Laud; of the Lord-Keeper Finch; of Windebank, Secretary of State; of six of the Judges for their conduct in relation to Ship-money; and of some other laymen and ecclesiastics.[3] The con-

Impeachment of Strafford.

His execution under a Bill of Attainder, 12 May, 1641.

Impeachment of Laud, Finch, Windebank and others.

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[1] Clarendon, Hist. i. 174.

[2] *Supra*, p. 543.

[3] For the details of Strafford's and Laud's impeachments, see *supra*, pp. 543–4. Finch and Windebank saved themselves by flight beyond sea;

Victims of the Star Chamber released.

demnation of Prynne, Burton, Bastwick, Leighton, and Lilburne, those victims of the tyranny of the Star Chamber, was declared illegal, and their liberation ordered. The return journey of the three former from their island prisons in Jersey, Guernsey, and Scilly, formed a triumphal procession, 'great herds of people meeting them at their entrance into all towns, and waiting upon them out with wonderful acclamations of joy.' Near London they were met by 'above ten thousand persons, with boughs and flowers in their hands, the common people strewing flowers and herbs in the ways as they passed, making great noise and expressions of joy for their deliverance and return; and in those acclamations mingling loud and virulent exclamations against the Bishops "who had so cruelly prosecuted such godly men."'[1]

Assistance voted to the Scots.

In the meantime, the presence of the Scotch army in the northern counties rendered the King powerless to resist the will of his Parliament. Instead of aiding him 'to chase out the rebels,' as he had asked them to do in his opening speech, the Commons fraternised with their 'brethren of Scotland,' and in addition to a grant of £25,000 a month so long as their stay in England should be necessary, voted them the sum of £300,000 as an indemnity and recompense for their brotherly assistance.[2]

Salutary Acts of the Long Parliament.

Master of the situation, the Parliament used its power with energy, tact, and moderation. During the first session of ten months a number of salutary Acts were passed, which, while sweeping away most of the accumulated abuses of recent times, left the ancient Constitution intact, and the just prerogatives of the King undiminished.

The Triennial Act, 1641.

(1) The first of these statutes regulated the intermission and duration of Parliament. By the 'Act for the preventing of inconveniences happening by the long intermission of Parliaments,' it was provided that if in every

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some of the other persons were never brought to trial, and the remainder were sentenced to payment of heavy fines.

[1] Clarendon, Hist. i. 202 (bk. iii.).

[2] Parl. or Const. Hist. ix. 93.

third year Parliament was not duly summoned and assembled before the 3rd day of September, it should, nevertheless, assemble on the second Monday in the ensuing November. For this purpose, the Lord Chancellor, or Keeper of the Great Seal, should be sworn to issue the writs for a new Parliament in due time, under pain of disability to hold his office, and further punishment; in case of his default, the Peers were enabled and directed to meet at Westminster, and any twelve or more of them to issue the writs; failing the Peers, the sheriffs, mayors, and bailiffs should cause elections to be made; and lastly, in their default, the electors themselves were to meet and proceed to choose their representatives, in the same manner as if writs had been regularly issued from the Crown. No future Parliament was to be dissolved, prorogued, or adjourned within fifty days after the time appointed for its meeting, except with its own consent: but it should be *ipso facto* dissolved at the expiration of three years from the first day of its session, unless actually sitting at the time, in which case the dissolution should be postponed till its first subsequent adjournment or prorogation.[1]

In the reigns of Edward II. and Edward III. it had been provided by statute that Parliament should be holden at least once in every year,[2] but as no provision was then made in case of the failure of the King to issue the necessary writs, the law had been dispensed with at pleasure. The known resolution of Charles to govern without a Parliament made it absolutely necessary that this defect in the machinery of the Constitution should be remedied. Carefully adhering to the old lines, the Triennial Act left untouched the King's prerogative of calling Parliament, and even extended the legal period of intermission from one year to three. It was only in the event of the King failing to exercise his prerogative within the prescribed time, that another mode was provided for ensuring the supremacy

[1] 16 Car. I. c. 1.; repealed, in 1664, by 16 Car. II. c. 1.
[2] *Supra*, pp. 282–3.

of the law. The limit placed on the duration of any one Parliament, although a novelty, was merely a matter of detail which did not trench upon the principle of the Constitution. The House of Commons not being an Estate in itself, but merely the representative of an Estate of the Realm, must be periodically renewed, or it would cease to be a really Representative assembly. The precise limit of duration, whether one year, or three, or seven, or any other number, is a matter to be decided by considerations of practical convenience and efficacy.

Tonnage and poundage granted for two months.

An Act was passed putting an end to the long-contested prerogative of levying Customs on merchandise. By this Act (which granted to the King tonnage and poundage for less than two months), after reciting that these duties, not having been granted by Parliament, had been collected against the laws of the realm, and that the farmers and collectors had received condign punishment, it was provided that in future any officer presuming to levy these customs, except during the time specified in the Act, should incur the penalties of *praemunire*, and be disabled during life to sue in any court. It was further, in general terms, 'declared and enacted that it is, and hath been, the ancient right of the subjects of this realm, that no subsidy, custom, impost, or other charge whatsoever, ought or may be laid or imposed upon any merchandise exported or imported by subjects, denizens, or aliens, without common consent in Parliament.'[1]

Ship-money abolished.

An 'Act for the declaring unlawful and void the late proceedings touching ship-money, and for the vacating of all records and process concerning the same,' was passed, declaring that charge illegal, and annulling the judgment in the Exchequer Chamber against Hampden as contrary to the laws and statutes of the realm, the right of property, the liberty of the subject, and the Petition of Right.[2] These

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[1] 16 Car. I. c. 8. The grant was continued by six subsequent Acts (cc. 12, 22, 25, 29, 31, 36) for short periods [down] to July 2, 1642.

[2] 16 Car. I. c. 14. Five of the Judges who had pronounced in favour of

two Acts closed the lengthy series of statutes which during the course of centuries had been passed in restraint of arbitrary taxation by the Crown.

Star Chamber abolished.

The next care of Parliament was to sweep away all those irregular and arbitrary tribunals which had been the principal instruments of despotic power. By an 'Act for the regulating of the Privy Council, and for taking away the court commonly called the Star-Chamber,' after reciting Magna Charta and its train of statutes for protecting the liberty and property of the subject, the Court of Star Chamber was abolished, and the old Constitutional principle re-enunciated 'that neither his Majesty nor his Privy Council hath, or ought to have, any jurisdiction, power, or authority, by any arbitrary way whatsoever, to examine or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom, but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law.' Under this statute, although the jurisdiction of the Privy Council, as well as of the Star Chamber, to try and determine any Civil or Criminal cause, was abrogated, the Council still retained the power of examining and committing persons charged with offences. But it was enacted that every person committed by the Council, or any of them, or by the King's special command, should, on application to the Judges of the King's Bench or Common Pleas, have granted unto him, without delay on any pretence whatever, a writ of *habeas corpus;* that in the return to the writ the gaoler should certify the true cause of commitment; and that the Court whence the writ had issued should, within three days, examine, and determine whether the cause were just and legal or not, and thereupon do what to justice should appertain, either by delivering, bailing, or remanding the prisoner.[1] Another clause of this Act abolished the Court

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ship-money (Berkeley, Crawley, Davenport, Trevor, and Weston) were imprisoned for their judgment.

[1] 16 Car. I. c. 10.

of the President and Council of the North—which under Strafford's arbitrary administration had given so much offence—the Court of the President and Council of the Welsh Marches (which extended its jurisdiction over the adjacent counties of Salop, Worcester, Hereford, and Gloucester), the Court of the Duchy of Lancaster, and the Court of Exchequer of the County Palatine of Chester—all irregular tribunals which, 'under various pretexts, had usurped so extensive a cognizance as to deprive one-third of England of the privileges of the common law.'[1]

High Commission Court abolished.

With the Court of Star Chamber and the provincial irregular tribunals fell also the Court of High Commission. By an Act intituled 'A repeal of a branch of a Statute primo Elizabethæ, concerning Commissioners for causes ecclesiastical,' after reciting that the Commissioners, to the insufferable wrong and oppression of the King's subjects, had illegally assumed the right to fine and imprison for ecclesiastical offences, the clause of the statute under which the Court had been erected was repealed, and the other Ecclesiastical Courts were deprived of all power to inflict fine, imprisonment, or corporal punishment.[2]

Purveyance restricted; compulsory knighthood abolished; extensions of the Royal forests annulled.

By other statutes the vexatious prerogative of Purveyance was restrained, writs to compel the taking up of knighthood were abolished, and the boundaries of the Royal forests were again reduced to their limits in the 20th year of James I.[3]

Among the beneficial Acts of the Long Parliament is

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[1] Hallam, Const. Hist. ii. 99. By another Act (16 Car. I. c. 15) certain abuses in the Stannary courts of Cornwall and Devon were remedied. The Council of the North was instituted by Henry VIII. at York, in 1537, after the suppression of the great northern insurrection, to administer justice and maintain order in Yorkshire and the four more northern counties, independently of the courts of Westminster. Strafford, as President, greatly extended the jurisdiction of this court, and excited much odium by his tyranny and arrogance. The Courts of the Council of the North and of the Marches of Wales were entirely abolished, but the jurisdiction of those of the Duchy of Lancaster and of the County Palatine of Chester was preserved as to matters touching the King's private estate.

[2] 16 Car. I. c. 11. The latter part of the Act was repealed after the Restoration.

[3] 16 Car. I. cc. 19, 20, 16.

also to be reckoned one which, while empowering the King to levy troops compulsorily for the suppression of the Irish rebellion, recites in the preamble that, 'by the laws of this realm none of his Majesty's subjects ought to be impressed or compelled to go out of his country to serve as a soldier in the wars, except in case of necessity of the sudden coming in of strange enemies into the kingdom, or except they be otherwise bound by the tenure of their lands or possessions.'[1]

Impressment declared illegal.

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[1] 16 Car. I. c. 28. Since this statute, impressment for the army has never been exercised by virtue of the Royal prerogative: but under the authority of Parliament it has occasionally been resorted to, more especially during the American war, as, *e.g.*, in 1779, by statute 19 Geo. III. c. 10. In later times, however, this odious violation of personal liberty—which has nothing in common with a national conscription applicable to *all* able-bodied citizens alike—has not been practised for strengthening the land forces, which have been recruited by enlistment, stimulated by bounties.

Impressment, for the army:

Impressment of *sailors* for the public service seems always to have stood on a somewhat different footing from military impressment. It is 'a prerogative inherent in the Crown,' says Sir Michael Foster, 'grounded upon common law and recognised by many Acts of Parliament.' (2 Ric. II. c. 4; 2 & 3 Phil. & Mary, c. 16; 2 & 3 Anne, c 6; 4 & 5 Anne, c. 19; 7 & 8 Will. III. c. 21; 5 & 6 Will. IV. c. 24.) Several early statutes against the impressment of soldiers (1 Edw. III. c. 5; 25 Edw. III. c. 8) are silent as to the impressment of sailors; a difference between the two services which was probably due in some measure to the fact that while the land service was provided for in ordinary cases by the military tenures and by the *jurati ad arma* or national militia, no competent provision was made by law for the ordinary sea-service, (except in the case of the Cinque Ports and a few others, which were altogether inadequate for the public service). During the American War the hardships and cruelties of the system of naval impressment, carried out by armed press-gangs, were a disgrace to a free country; and since the conclusion of peace, Ministers and Parliament, alive to the dangerous principles on which recruiting for the navy had hitherto been conducted, have devised new expedients—higher wages, larger bounties, shorter periods of service, and a reserve volunteer force—more consistent with the liberty of the subject. The right of impressment for the navy has not yet been formally renounced by law; but the Commission on Manning the Navy, in 1859, reported that 'the evidence of the witnesses, with scarcely an exception, shows that the system of naval impressment, as practised in former wars, could not now be successfully enforced.'—See Foster, Crown Law, 154–180: and May, Const. Hist. iii. 20–24. [Cf. also Denman's Broom's *Const. Law*, pp. 111–13, where Dr. Broom appears to consider impressment for the Navy to be 'one species of compulsory servitude, the legality of which rests on an intelligible principle, and depends on our customary law.' But the learned author omits to state this principle, unless it be found in his citation of Sir Michael Foster's '*ne quid detrimenti respublica capiat*,' which, broadly put, would cover anything, however injurious to the liberty of the subject. Yet Dr. Broom admits that 'it would be difficult to conceive a more startling infraction than this of the liberty of the subject,' and he 'confidently predicts that the system will not again be enforced' (*loc. cit.*). It may be hoped, from a Constitutional point of view, that Dr. Broom's confident prediction will be fulfilled in future naval wars in which Great Britain may be engaged.—ED.]

for the navy.

Hallam's remarks on the foregoing legislation.

Upon the foregoing statutory measures of the Long Parliament Hallam makes two just remarks: (1) 'They made scarce any material change in our constitution such as it had been established and recognised under the house of Plantagenet . . . . the monarchy lost nothing that it had anciently possessed; and the balance of our constitution might seem rather to have been restored to its former equipoise than to have undergone any fresh change.' (2) 'By these salutary restrictions, and some new retrenchments of pernicious or abused prerogative, the long parliament formed our constitution such nearly as it now exists.'[1]

Acts against the dissolution of Parliament without its own consent, and for disabling the clergy to exercise temporal jurisdiction.

Two other statutes of the Long Parliament, one providing that the Parliament then sitting should not be prorogued or dissolved without its own consent, and the other depriving the Bishops of their suffrages among the Peers, are more open to animadversion. They were both departures from the old lines of the Constitution; but the one, which was of a purely temporary nature, was rendered necessary by the deep and well-founded distrust which the character of Charles had inspired;[2] the other was the outcome of that abuse of their coercive jurisdiction and temporal power, by which the Bishops had rendered themselves odious not merely to the Puritans, but even to many of those who wished well to the cause of both Church and King.[3]

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[1] Hallam, Const. Hist. ii. 101, 102.

[2] The 'Act to prevent inconveniences which may happen by the untimely adjourning, proroguing, or dissolving of this present Parliament' (16 Car. I. c. 7), was ostensibly grounded on the necessity of speedily raising money for the relief of the army in the northern parts of the realm, and the impossibility of borrowing 'on the authority of resolutions of parliament,' unless some security was furnished to the creditors, that the assembly would not be dissolved before sufficient provision had been made for repayment of the moneys to be raised. But the chief motive was, undoubtedly, 'a just apprehension of the king's intention to overthrow the parliament,' and of personal danger to the popular leaders after a dissolution. It was clearly proved that the King had given his sanction to a plan to bring up the English army from the north in order to overawe the Parliament.—Hallam, Const. Hist. ii. 113.

[3] In a very remarkable conversation with Hyde, Sir Edward Verney, who was killed at the battle of Edgehill, declared his reluctance to fight for the Bishops, whose quarrel he took it to be, though bound in gratitude not to desert the King.—Clarendon, Life, p. 68. The Act to disable persons in holy

After a session of ten months devoted to passing the series of Acts above enumerated, the two Houses, in September, 1641, adjourned for a short recess of six weeks. It was about this time that a final schism in the Constitutional party developed itself. The concessions already made by the King were deemed by a large minority a sufficient surrender of the Royal power. 'The King was now,' observes Mr. Forster, 'to all appearance the weaker party, and the House of Commons was the stronger; and how readily sympathy is attracted to those who are weak, however much in the wrong, and how apt to fall away from the strong, however clearly in the right, it does not need to say. The popular leaders became conscious of daily defections from the ranks; the House of Lords unexpectedly deserted them on questions in which they had embarked in unison; the army was entirely unsafe; and opinions began to be busily put about that enough had been conceded by the King, and that the demand for more would be ungenerous.

Parliament adjourned.

Schism in the Constitutional party.

Old positions reversed.

Daily defections from Popular ranks.

'Never had a great cause been in peril more extreme. For most thoroughly was the character of their adversary known to its chiefs, and that not a single measure of redress had been extorted from him which was not yielded in the secret hope of finding early occasion to reclaim it. It was notorious that Charles the First entertained a belief of the invalidity of the most important of the measures already passed by the Long Parliament on the ground that his own assent, having been given by compulsion, was *ipso facto* void. His Attorney-General had encouraged him in this notion;[1] and Hyde himself[2] cannot help condemning the facility with which he assented to acts requiring grave deliberation, in reliance on this dangerous opinion that the violence and force used

Character of the King.

His view as to invalidity of statutes [passed without his internal assent].

Assenting with purpose to revoke.

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orders to exercise any temporal jurisdiction or authority (16 Car. I. c. 27), passed Feb. 1641–2, was repealed after the Restoration by 13 Car. II. c. 2.

[1] Clarendon, Life and Continuation, i. 206–211.

Clarendon, Hist. ii. 252.

in procuring them rendered them absolutely invalid and void.'[1]

The leaders of the Commons were convinced, rightly as we now know, that the King was bent upon recovering, by force or fraud, the arbitrary powers which he had been compelled to surrender; that unless further securities were taken, and a constant vigilance maintained, there was danger not only of the loss of their newly vindicated liberties, but of the subversion of the existing free Parliamentary Constitution and the establishment in its stead of the Personal Government of the King. As under Richard II., so now under Charles I., the question between King and People was again practically narrowed to the simple issue of Absolute Monarchy versus Parliamentary Government. Pym and his co-workers in the Parliament felt that the time had come to make an earnest appeal to the people, warning them, by a recital of the lessons of the past, that no faith could be reposed in the King.

Freedom or despotism?

The Parliamentary leaders resolve to appeal to the people.

Charles goes to Edinburgh.

Object of his journey.

In the meantime Charles had gone to Edinburgh, much against the wish of the Commons, partly for the purpose of adjusting the points of difference which remained between him and his Scottish subjects, but mainly, as has since been shown, with the object of gathering 'supposed proofs with which to build a charge of treason against Pym and Hampden, and such accessions from the undisbanded Scotch army to the conspirators of the army of the North as to render safe the prosecution of such a charge.'[2]

Negotiations for giving office to the popular leaders.

Chiefly with the view of saving Strafford's life, the King had, some months previously, made overtures for giving office to the leaders of the Popular party, and had even made St. John, one of the most uncompromising opponents of the Court, Solicitor-General, besides appointing Lords Essex, Holland, and Saye to other posts. But the ill-timed death of the Earl of Bedford, a Puritan who was

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[1] Forster, Grand Remonstrance, p. 154.
[2] Grand Remonstrance, p. 154.

to have been made Lord Treasurer, and the discovery of the first Army-plot, had caused the scheme to fall through. Warned before his departure for Scotland of the intention of the leaders of the Popular party to put forth the Grand Remonstrance, Charles now caused negotiations to be opened for a revival of the plan of giving them office. 'What had formerly for its object to save Strafford's life, was now designed to save the King, by giving him time to ruin the very men he was meanwhile to invite to serve him. The continued hostility of Pym and Hampden to the Scottish visit, and their calm determination to bring forward the Remonstrance, baffled the plan.'[1]

The *Incident* in Scotland:

At Edinburgh, Charles set himself to winning over the Parliament and Church of Scotland against the Parliament of England, by granting all their demands, by assiduously attending the Presbyterian worship, and by lavishing favours upon the chiefs of the Covenanters. At the same time he was secretly searching for proofs of the correspondence of the English political leaders with the Scots prior to the late invasion, with the object of bringing a charge of treason against the former, on his return. Acting on information supplied by the Earl of Montrose that the Marquis of Hamilton and the Earl of Argyle had been implicated in the plans of the English malcontents, the King even assented to a design for their sudden arrest and the seizure of their papers, but these two noblemen, forewarned of the plot, frustrated it by publicly withdrawing from the Scottish Parliament, and seeking refuge in Kinneil Castle, the residence of Hamilton's brother. The King complained of the suspicions of the Lords as an insult to his honour. A Committee of enquiry was ordered by the Parliament, which elicited nothing decisive on either side, and Hamilton and Argyle were induced to return to Parliament. But the leaders of the English House of Commons, which had sent a small committee to Scotland, with

[1] Forster, Grand Remonstrance, p. 159.

Hampden as its presiding member, to be near the King and watch proceedings, were kept well informed of the real facts. And the news of the 'Incident,' as the affair of Hamilton and Argyle was popularly termed, excited much agitation and alarm in London, lest this design against the two great leaders of the Constitutional party in the northern kingdom, should be followed by similar measures against the English malcontents. About the same time (Nov. 1) came tidings of the Irish rebellion, with its attendant massacre, which raised a fierce outcry against all Papists, and was by many believed to have been secretly instigated or encouraged by the King.[1]

and the Rebellion in Ireland.

Re-assembling of Parliament, Oct. 20, 1641.

Motion of Pym on the new Army-plot.

On the 20th October, 1641, the Parliament re-assembled. An examination into an alleged new Army-plot was instituted in the Commons, and on the 18th November Pym moved and carried a resolution, 'that in the examinations now read unto us, we did conceive that there was sufficient evidence for us to believe, that there was a second design to bring up the army to overawe the deliberations of this House.' 'This,' observes Mr. Forster, 'was the most direct avowal yet made of a consciousness on the part of the Commons, not merely of what had taken the King to Scotland, but of what still kept him there. The alarm and dismay it carried with it showed how unerringly the mark had been hit.'[2]

The *Grand Remonstrance* laid on the table of the House.

On the 8th November the rough draft of the Remonstrance, or 'Declaration of the State of the Kingdom,' was laid upon the table of the House. Secretary Nicholas at once wrote to the King informing him of the fact, and

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[1] Though doubtless in no way connected with the original rising, the King had been in negotiation with the Irish, through his agent, Lord Glamorgan, (who was empowered to treat with them without the knowledge of Ormond, the Lord Lieutenant), for help against his Parliament. On the Irish Rebellion, see the Ulster Civil War of 1641, by John McDonnell, M.D. (Dublin, 1879) —[and the recent works, *Ireland in the Seventeenth Century; or, the Irish Massacres of* 1641–2, *their Causes and Results.* By Mary Agnes Hickson. Lond. 1884, and *Cromwell in Ireland.* By Rev. Denis Murphy, S.J. Dublin. 1883. Cf. also, Art. on The Irish Massacres of 1641, in *Edinburgh Review*, No. 328, for Oct. 1884.—ED.].

[2] Forster, Grand Remonstrance, p. 210.

urging his instant return to London. In reply the King wrote, 'You must needs speak with such of my servants that you may best trust, in my name, that by all means possible this Declaration may be stopped.' Under the leadership of Hyde, a band of Members in the Lower House was now organised as what was truly to be called His Majesty's Opposition. With steady perseverance and tenacity the passage of the Remonstrance was disputed clause by clause during a seven days' debate. Only the most watchful and resolute determination on the part of the Popular leaders availed to maintain any part of it unimpaired; and all the forms of the House were exhausted in pretences for delay. At length the final debate was fixed for the 22nd November. The King, eager at last to reach London before the final vote could be taken, was now hastening with all speed back from Edinburgh, and on the eventful 22nd was only distant two days' journey from the Metropolis. For fourteen hours the debate was sustained with much warmth by Hyde, Falkland, Dering, Rudyard, Bagshaw, Culpeper, Pym, Orlando Bridgman, Waller, Hampden, Holles, Glyn, Coventry, Geoffrey Palmer and Maynard. Near midnight Secretary Nicholas retired, and wrote to the King that the Commons had been in debate since twelve at noon and were at it still, it being then near twelve at midnight. 'I stayed this despatch,' he continued, 'in hopes to have sent your Majesty the result of that debate, but it is so late, as I dare not (after my sickness) adventure to watch any longer to see the issue of it: only I assure your Majesty there are divers in the Commons House that are resolved to stand very stiff for rejecting that Declaration, *and if they prevail not then to protest against it.*'

Organised Court opposition to it.

Seven days' debate.

The final debate.

At length, about two in the morning, the Remonstrance was carried by a majority of eleven only. So critical was the contest deemed, that Cromwell declared to Lord Falkland, as they were leaving the House together after the division: 'had the Remonstrance been rejected, I would to-morrow have sold everything I possess, and never seen

The Remonstrance carried by 11 votes.

England more; and I know many other honest men of the same resolution.'

What the Grand Remonstrance was.

An Appeal to the country.

The nature and design of this memorable Constitutional document, the most complete justification of the Great Rebellion, may be concisely described in the words of Mr. Forster, as, 'in brief, an appeal to the country; consisting on the one hand, of a dignified assertion of the power of the House of Commons in re-establishing the public liberties, and, on the other, of an urgent representation of its powerlessness either to protect the future or save the past, without immediate present support against papists and their favourers in the House of Lords, and their unscrupulous partizans near the throne. There is in it, nevertheless, not a word of disrespect to the person or the just privileges of royalty; and nothing that the fair supporters of a sound Church Establishment might not frankly have approved and accepted. Of all the State Papers of the period, it is in these points much the most remarkable; nor, without very careful reading it, is it easy to understand rightly, or with any exactness, either the issue challenged by the King when he unfurled his standard, or the objects and desires of the men who led the House of Commons up to the actual breaking out of the war.'[1]

No disrespect to King or Church.

States what the war put in issue.

The Preamble.

The Preamble, consisting of twenty unnumbered clauses, and opening in the name of 'The Commons in the present Parliament assembled,' begins by declaring that for the past twelve months they had been carrying on a struggle of which the object was to restore and establish the ancient honour, greatness, and security, of the Nation and the Crown:—That the object of the Remonstrance was as well to answer the great aspersions cast upon what they had done, as to point out what remained to do, and the difficulties raised for their hindrance. In express terms they denounce the Court conspiracy to subvert the fundamental

[1] Grand Remonstrance, pp. 11[5–16], 215 *seq.*

laws and principles of government, to degrade the Protestant religion, to discredit the claims and authority of Parliament, and to introduce such opinions and ceremonies as would necessarily end in accommodation with Popery.

Proofs and illustrations.

The body of the Remonstrance is contained in 206 numbered clauses, (each clause, as we have seen, having been separately voted by the House,) and takes the form of practical proofs and illustrations of the statements advanced in the Preamble.

After detailing, with vigorous and incisive rhetoric, all the invidious and tyrannical proceedings of the King during his first, second, and third Parliaments; the government by prerogative from the third Parliament to the pacification of Berwick; the Short Parliament and the Scottish invasion; the remedial Acts of the Long Parliament; and the practices of the Court party; the Remonstrance proceeds to set forth the defence of the Popular leaders.

Defence of the leaders of the Commons.

'What hope,' they said, 'have we now but in God? The only means of our subsistence, and power of reformation, is, under Him, in the Parliament; but what can we, the Commons, do, without the conjunction of the House of Lords? And what conjunction can we expect there, when the bishops and the recusant Lords are so numerous and prevalent, that they are able to cross and interrupt our best endeavours for reformation, and by that means give advantage to this malignant party to traduce our proceedings?

Reply to their assailants.

'They infuse into the people that we mean to abolish all Church government, and leave every man to his own fancy for the service and worship of God, absolving him of that obedience which he owes, under God, to his Majesty; whom we know indeed to be entrusted with the ecclesiastical law as well as with the temporal, to regulate all the members of the Church of England—though by such rules of order and discipline only as are established by Parliament; which is his great council in all affairs, both in Church and State.

'They have strained to blast our proceedings in Parlia-

Distortion of their attitude towards Episcopacy.

ment by wresting the interpretations of our orders from their genuine intentions. They tell the people that our meddling with the power of episcopacy hath caused sectaries and conventicles, when it is idolatry, and the Popish ceremonies introduced into the Church by command of the bishops, which have not only debarred the people from them but expelled them from the kingdom. And thus, with Eliab, we are called by this malignant party the troublers of the State; and still, while we endeavour to reform their abuses, they make us authors of those mischiefs we study to prevent.

Design of the Bishops' Bill.

'We confess our intention is, and our endeavours have been, to reduce within bounds that exorbitant power which the prelates have assumed unto themselves, so contrary both to the word of God and to the laws of the land: to which end we passed the bill for the removing them from their temporal power and employments, that so the better they might with meekness apply themselves to the discharge of their functions; which Bill they themselves opposed, and were the principal instruments of crossing.[1]

No intention to relax just discipline.

'And we do here declare that it is far from our purpose or desire to let loose the golden reins of discipline and government in the Church, leaving private persons, or particular congregations to take up what form of divine service they please: for we hold it requisite that there should be, throughout the whole realm, a conformity to that order which the laws enjoin according to the Word of God. But we desire to unburthen the consciences of men

Conformity desired.

[1] Three Bills were introduced by the Commons for taking away the temporal power of the bishops. The first, 'A Bill to restrain Bishops, and others in Holy Orders, from intermeddling in secular affairs,' was sent up to the Lords, May 1st, 1641, where it was thrown out by a large majority. The second, popularly termed the 'Root and Branch Bill,' was intituled 'for the utter abolishing and taking away all Archbishops, Bishops, their Chancellors and Commissaries, Deans and Chapters, Archdeacons, Prebendaries, Chanters, Canons, and all other their under-officers.' It was introduced by Sir Edward Dering while the first Bill was still pending, but after being long and vehemently debated, was allowed to drop on the King's departure for Scotland. The third, which passed into a law in Feb. 1641–2 (*supra*, p. 611), was the last concession made by Charles before finally quitting London with the intention of appealing to arms.

of needless and superstitious ceremonies, to suppress innovations, and to take away the monuments of idolatry.'

Suggestion for a Synod to settle Church government.

They then suggest a general Synod of divines, the result of whose consultations should be represented to the Parliament, there to be allowed of and confirmed, and to receive the stamp of authority.

Desire to advance learning,

'We have been maliciously charged,' they continue, 'with the intention to destroy and discourage learning, whereas it is our chiefest care and desire to advance it, and to provide such competent maintenance for conscientious and preaching ministers throughout the realm as will be a great encouragement to scholars, and a certain means whereby the want, meanness, and ignorance, to which a great part of the clergy is now subject, will be prevented. And we have intended likewise to reform and purge the Fountains of Learning, the two Universities, that the streams flowing from thence may be clear and pure, and an honour and comfort to the whole land.'

by reforming Universities.

Remedial measures demanded.

Finally, the Remonstrance specifies the Remedial Measures demanded: 'the groundwork of which,' remarks Mr. Forster, 'was precisely that which formed afterwards the basis of the settlement by which alone the Monarchy was again firmly established in England.'

(i.) Safeguards against Roman Catholic religion.

Suggested Commission.

(i.) To keep Papists in such condition, as that they might not be able to do any hurt; and for avoiding such connivance and favour as had theretofore been shown to them, his Majesty was moved to grant a standing commission to some choice men named in Parliament, who might take watch of their increase, report upon their counsels and proceedings, and use all due means, by execution of the laws, to prevent mischievous designs, from that quarter, against the peace and safety of the realm. And further, that some sufficient tests should be applied to discover the false conformity of Papists to the English Church, by colour of which they had been admitted into places of highest authority and trust.

(ii.) Securities for administration of laws.

(ii.) That, for the better preservation of the liberties and laws, all illegal grievances and exactions should be pre-

sented and punished at the sessions and assizes; and that judges and justices should be sworn to the due execution of the Petition of Right and other laws.

(iii.) Protection against evil councillors.

(iii.) A series of precautions were suggested to prevent the employment of evil councillors; and it was plainly stated that supplies for the support of the King's own estate could not be given, nor such assistance provided as the times required for the Protestant party beyond the sea, unless only such councillors, ambassadors, and other ministers were in future employed, as Parliament could give its confidence to; and unless all councillors of State were sworn, as well to avoid receiving, in any form, reward or pension from any foreign prince, as to observe strictly those laws which concerned the subject at home in his liberty.

Parliament to be consulted in choice of Ministers; who should be sworn to observe the laws.

'If these things,' the Remonstrance concludes, 'be observed, we doubt not but God will crown this Parliament with such success, as shall be the beginning and foundation of more honour and happiness to his Majesty, than ever was yet enjoyed by any one of his royal predecessors.'[1]

Motion to print the Remonstrance.

Immediately after the remonstrance had been voted, Mr. Peard, Member for Barnstaple, moved that it should be forthwith printed. Hyde opposed the design as unlawful and mischievous, and in pursuance of the tactics already decided upon, said that if the motion were adopted, he should ask leave of the House to protest. Other voices cried out that they protested, and Mr. Palmer declared 'I protest for myself and all the rest.' Protests, though in use with the Lords, were utterly unknown to the Commons, and the presumption of Palmer, not merely in protesting at all without leave of the House, but also in the name of 'all the rest,' raised such a tumult that many members laid their hands upon their swords, and a violent conflict seemed im-

Protest of Mr. Palmer.

[1] The Remonstrance is printed *in extenso* in Rushworth's Collections, part 3, i. 438. For a just apprehension of its real nature and importance, Mr. Forster's 'Grand Remonstrance, 1641,' (from which the particulars in the text are mainly drawn), should be carefully studied.

minent, 'had not the sagacity and calmness of Mr. Hampden,' says an eye-witness, 'by a short speech prevented it.' On a division it was decided by a majority of 23 that although the Remonstrance might be published, it should not be printed until the further order of the House.

The question whether the minority should be allowed to protest against a decision of the House of Commons was far too serious to admit of Palmer's offence being passed over unpunished. It was of vital importance to the authority and influence of the Commons that, no matter what their internal divisions might be, their decisions should be kept before the people sole and intact. 'Palmer's success would have divided the House against itself. Once admit such division, all the votes of the past year would lose their claim to continued respect, and the Sovereign would again be uncontrolled.'[1] At the next sitting of the House, Palmer, after being heard in his defence, was committed to the Tower, but almost immediately afterwards released, on making a humble apology and retractation. On the 15th December (1641), the Remonstrance, having been previously presented to the King, was ordered to be printed by a majority of 135 votes to 83.

Impeachment and attempted arrest of the Five Members.

The next important, and indeed the critical, event in the relations between Charles I. and his Parliament was the Impeachment and attempted arrest of the Five Members. The King had no intention of submitting quietly to the adverse vote of the House of Commons. He once more, indeed, even with what he afterwards alleged to be the proofs of treason in his hands, attempted to make use of what Clarendon has termed 'the stratagem of winning men by places,'[2] by offering the Chancellorship of the Exchequer to Pym, the leader of the Popular party.[3] But this attempt at conciliation failed, like the former, doubtless on account of the utter distrust and disbelief which the King

Preliminary measures.

[1] Forster, Grand Remonstrance, p. 347.
[2] Clarendon, Hist. ii. 60.
[3] Forster, Arrest of the Five Members, p. 59.

in all his dealings had inspired. Charles now seems to have resumed his original intention to crush his opponents. The leaders of the opposition to the Remonstrance were called to office. Hyde preferred for the present to serve the King as a private member of the House, but Falkland accepted the post of Secretary of State, and Culpeper that of Chancellor of the Exchequer. Balfour, the tried friend of the Parliament, was removed from the Governorship of the Tower—the 'bridle' of the City—and Colonel Lunsford, a soldier of evil character and infamous name, was appointed in his place 'as one,' says Clarendon, 'who would be faithful for the obligation, and execute anything desired or directed.' The appointment of Lunsford excited tumults in the City and at Westminster. The Commons demanded his removal, and at length the King was obliged to give way, appointing Sir John Byron in his stead. Disturbed by secret reports and the unusual concourse of armed men about the King at Whitehall, the Commons sought the protection of a guard. On the 30th of December, Pym (who seems to have already received intimation of the intended Impeachment) moved 'that there being a design to be executed this day upon the House of Commons, we might send instantly to the City of London .... to come down with the Train bands for our assistance.' The next day the Commons sent a verbal message to the King by Denzil Holles, expressing their earnest desire for a guard out of the City, under command of the Earl of Essex. The King required the message to be communicated to him in writing. This was immediately drawn up and presented, but no answer was returned for three days. At length, on the 3rd of January, 1641-2, the King's answer came. It was a refusal, but accompanied by a promise 'on the word of a king, that the security of all and every one of you from violence, is and shall ever be as much our care as the preservation of us and our children.' At that very time the Attorney-General was engaged in delivering a Royal message to the House of Lords, impeaching of high treason Lord Kimbolton and five members of the Com-

The Impeachment.

mons, Pym, Hampden, Holles, Haslerig, and Strode.[1] He demanded that the House should secure the persons of the accused and appoint a Committee to examine the charges. The Lords, 'appalled' (to quote Clarendon's expression) at this proceeding, at once raised the question of the illegality of the accusation, and disregarding the King's request, sent an immediate message to the Commons and named members for a conference. In the meantime the King's officers had gone to the houses of the five Members and were putting seals on everything found there. The Commons, having just heard of these proceedings, had voted them a breach of privilege, when the King's Serjeant appeared, and in the name of his master 'required Mr. Speaker to place in his custody five gentlemen, members of this House (naming them), whom his Majesty had commanded him to arrest for high treason.' The House appointed a Committee, including two Ministers of the Crown, Lord Falkland and Sir John Culpeper, to attend on and inform the King that such an important message could only be answered after mature consideration, but

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[1] A copy of the charge, endorsed in the handwriting of Secretary Nicholas as 'Articles of treason against Mr. Pym and the rest,' exists among the State Papers, and is printed in Mr. Forster's 'Arrest of the Five Members' (p. 114) as follows: 'Articles of High Treason and other high misdemeanors ag^t the Lord Kemolton, Mr John Pym, Mr John Hampden, Mr Denzil Hollis, Sir Arth^r Haslericke, and Mr Wm Strode.

Articles of impeachment against the Five Members.

'1. That they have traytorously endeav^rd to subvert the fundamentall Lawes and Gov^nt of the Kingdome of England, to deprive ye King of his royale power, and to place in subjects an arbitrary and tyrannicall power over the lives, libertyes, and estates of his Maj^ts lovinge people.

(i.) *General charge.*

(ii.) *Authorship of Remonstrance.*

'2. That they have traytorously endeav^d by many fowle aspersions upon his Matie and his Govern^t, to alienate the affections of his people, and to make his Matie odious unto them.

(iii.) *Tampering with the army.*

'3. That they have endeav^d to drawe his M^ts late armye to disobedience to his Maties comands, and to syde with them in their traytorous designs.

'4. That they have traytorously invited and incouraged a forreigne power to invade his Maties kingdome of England.

(iv.) *Invitation to the Scotch.*

'5. That they have traytorously endeav^d to subvert the rights and very being of Parl^ts.

(v.) *Punishment of protesting minority.*

'6. That for the compleating of their traytorous designs, they have endeav^d, as farr as in them lay, by force and terror to compell the Parlam^t to joyne with them in theire traytorous Designs, and to that end have actually raysed and countenanced tumults ag^t ye King and Parlam^t.

(vi.) *Raising tumults.*

'7. That they have traytorously conspired to levie, and actually have levyed warr ag^t the King.' Referring to the armed guard which they had persisted in voting for the protection of the House.

(vii.) *Levying war.*

that the accused would be ready to answer any *legal* charge made against them. The five Members were ordered to attend daily in their places, and the previous resolution for a military guard out of the City was turned into an Order of the House and sent by the hands of two of the Members for the City to the Lord Mayor. Of this Impeachment Macaulay has remarked, 'it is difficult to find in the whole history of England such an instance of tyranny, perfidy, and folly. The most precious and ancient rights of the subject were violated by this act. The only way in which Hampden and Pym could legally be tried for treason at the suit of the King was by a petty jury on a bill found by a grand jury. The attorney-general had no right to impeach them. The House of Lords had no right to try them. . . . . The tyrant resolved to follow up one outrage by another. In making the charge he had struck at the institution of juries. In executing the arrest, he struck at the privileges of Parliament. He resolved to go to the House in person with an armed force, and there to seize the leaders of the opposition while engaged in the discharge of their parliamentary duties.'[1]

Commons apply to the City for a guard.

Illegality of the Impeachment.

Preparations for the arrest.

Careful preparations were made to ensure the success of this *coup d'état.* Whitehall was fortified with a considerable accession of arms and ammunition, and the Palace guard were ordered to hold themselves in readiness. Sir William Killigrew was sent round to each of the Inns of Court (collectively capable of furnishing a military guard of at least 500 men) with copies of the Articles of Treason, and with a summons from his Majesty in each case to be in waiting the next morning at Whitehall. Late in the night the King, after consultation with his Secretary, Nicholas, sent instructions to the Lord Mayor of London not merely to refuse to the Commons the guard which they had requested, but in its place to enrol such a guard for the Royal service, with orders for its immediate employment in suppressing and dispersing all tumults and assemblages

[1] Macaulay (Nugent's Memorials of Hampden), [Essays, 1862, i. 472.—ED.].

of the people in the streets of the City, and with express instructions, 'by shooting with bullets, or otherwayes, to suppresse those tumults and destroy such of them as shall persist in their tumultuous wayes and disorders.'[1]

Pym's speech in answer to the charge.

The next morning, the 4th of January (1641–2), the accused Members attended in their places, and in a Grand Committee of the House defended themselves from the charges which the King had brought against them. Pym, admitting that the articles, if proved, amounted to high treason, proceeded to clear himself by drawing a parallel between his actions and the Articles. 'If,' he said, 'to vote with the Parliament, as a member of the House, wherein all our votes ought to be free, be to endeavour to subvert the fundamental laws, then I am guilty of the first article. If to agree and consent by vote with the whole state of the kingdom, to ordain and make laws for the good government of the king's subjects, in peace and dutiful obedience to their lawful sovereign, be to introduce an arbitrary and tyrannical government, then I am guilty of the second article. If to consent, by vote with the Parliament, to raise a guard or trained band, to secure and defend the persons of the members, environed and beset with many dangers in the absence of the King; and to vote with the House, in obedience to the King's command, at his return, be actually to levy arms against the King, then I am guilty of the third article. If to join with the Parliament of England, by free vote, to crave brotherly assistance from Scotland to suppress the rebellion in Ireland, be to invite and encourage a foreign power to invade the kingdom, then I am guilty of high treason by the fourth article. If to agree with the greatest and wisest council of state, to suppress unlawful tumults and riotous assemblies—to agree with the House, by vote, to all orders, edicts, and declarations for their repelling,—be to raise and countenance them in their unlawful actions, then am I guilty of the fifth article. If by free vote to join with the Parlia-

[1] Forster, Arrest of the Five Members, 154–157.

ment in publishing of a Remonstrance, in setting forth declarations against delinquents in the State, against incendiaries against his Majesty and his kingdom, against ill counsellors which labour to avert the king's affections from Parliament,—against those ill-affected bishops that have innovated our religion, oppressed painful, learned, and godly ministers with vexatious suits and molestations in their unjust courts; by cruel sentences of pillory and cutting off their ears; by great fines, banishments and perpetual imprisonments;—if this be to cast aspersions upon his Majesty and his government, and to alienate the hearts of his loyal subjects, good Protestants and well-affected in religion, from their due obedience to his royal Majesty, then I am guilty of the sixth article. If to consent, by vote with the Parliament, to put forth proclamations, or to send declarations to his Majesty's army, to animate and encourage them to his loyal obedience, to give so many subsidies, and raise so many great sums of money, willingly, for their keeping on foot, to serve the King upon his royal command, on any occasion; to apprehend and attack as delinquents such persons in the same as were disaffected both to his sacred person, his crown and dignity, to his wise and great council of Parliament, to the true and orthodox doctrine of the Church of England, and to the true religion grounded on the doctrine of Christ himself, and established and confirmed by many Acts of Parliament in the reigns of Henry VIII., Edward VI., Elizabeth, and James,—if these be to draw his Majesty's army into disobedience and to side with us in our dangers, then am I guilty of the seventh article.'[1] When the last of the accused Members had resumed his seat, the Commons resolved to request a conference with the Lords to acquaint them that 'a scandalous paper' (the Articles of Impeachment) had been published, and to require their

The Impeachment voted 'a scandalous paper.'

[1] The order in which the articles are enumerated by Pym does not correspond with the copy existing in the handwriting of Secretary Nicholas (*supra*, p. 623). The latter was probably only a draft, which was rearranged before formal presentation.

help in instituting inquiries as to who were its authors and publishers, to the end that they might receive condign punishment, and the Commonwealth be secured against such persons.[1]

Attempted arrest by the King and an armed force.

Forewarned of the King's approach at the head of 400 or 500 armed men, the accused Members, by the desire of the House, discreetly withdrew as the King was entering New Palace Yard.

At the entrance to Westminster Hall the King's armed band formed suddenly into a lane, ranging themselves on either side along the whole length of the Hall, and Charles, passing through this lane, ascended the stairs leading to the House of Commons. 'The King's command had been, according to Sir Ralph Verney and Captain Slingsby, himself one of the company, that the great body should stay in the Hall; but, says D'Ewes, "his Majesty coming into the lobby, a little room just without the House of Commons, divers officers of the late army of the North, and other desperate ruffians, pressed in after him to the number of about fourscore, besides some of his pensioners."' Charles entered the House, followed only by his nephew, the Elector Palatine, having commanded the rest of his followers 'upon their lives not to come in;' but the door was not permitted to be closed behind him. 'Visible now at the threshold to all, were the officers and desperadoes above named, of whom, D'Ewes proceeds, "some had left their cloaks in the Hall, and most of them were armed with pistols and swords, and they forcibly kept the door of the House of Commons open, one Captain Hide standing next the door holding his sword upright in the scabbard:" a picture which Sir Ralph Verney, who was present that day in his place, completes by adding that "so the doors were kept open, and the Earl of Roxborough stood within the door, leaning upon it." As the King entered all the Members rose and uncovered,

[1] Forster, Arrest of the Five Members, p. 172.

and the King also removed his hat, and it would not have been easy, says Rushworth, to discern any of the Five Members had they been there, among so many bare faces standing up together. But there was one face among the Five, which Charles knew too well not to have singled out even there; and hardly had he appeared within the chamber, when it was observed that his glance and his step were turned in the direction of Pym's seat close by the bar. His intention, baffled by the absence of the popular leader, can only now be guessed at; but Rushworth adds, "his Majesty not seeing Mr. Pym there, knowing him well, went up to the chair." As he approached the Chair, Lenthall stepped out to meet him; upon which "he first spake," says D'Ewes, saying, "Mr. Speaker, I must for a time make bold with your chair." And then the King stepped up to his place and stood upon the step, but sat not down in the Chair. And after he had looked a great while he spoke again. "Gentlemen," he said, "I am sorry for this occasion of coming unto you. Yesterday I sent a serjeant-at-arms upon a very important occasion to apprehend some that by my command were accused of High Treason; whereunto I did expect obedience, and not a message. And I must declare unto you here, that albeit no king that ever was in England shall be more careful of your privileges, to maintain them to the uttermost of his power, than I shall be, yet you must know that in cases of treason no person hath a privilege. And therefore I am come to know if any of these persons that were accused are here." Then he paused; and casting his eyes upon all the Members in the House, said, "I do not see any of them. I think I should know them." "For I must tell you, gentlemen," he resumed, after another pause, "that so long as those persons that I have accused (for no slight crime, but for treason) are here, I cannot expect that this House will be in the right way that I do heartily wish it. Therefore I am come to tell you that I must have them wheresoever I find them." Then again he hesitated, stopped: and called out, "Is Mr. Pym here?" To which nobody gave answer.

The King's speech.

"He then asked (continues D'Ewes) for Mr. Hollis, whether he were present, and when nobody answered him, he pressed the Speaker to tell him, who, kneeling down, did very wisely desire his Majesty to pardon him, saying that he could neither see nor speak but by command of the House: to which the King answered, 'Well, well; 'tis no matter. I think my eyes are as good as another's.' And then he looked round about the House a pretty while to see if he could espie any of them." After that long pause described by D'Ewes, "the dreadful silence," as one Member called it, Charles spoke again to the crowd of mute and sullen faces. The complete failure of his scheme was now accomplished, and all its possible consequences, all the suspicions and retaliations to which it had laid him open, appear to have rushed upon his mind. "Well, since I see all my birds are flown, I do expect from you that you will send them unto me as soon as they return hither. But, I assure you, on the word of a king, I never did intend any force, but shall proceed against them in a legal and fair way, for I never meant any other. And now, since I see I cannot do what I came for, I think this no unfit occasion to repeat what I have said formerly, that whatsoever I have done in favour and to the good of my subjects, I do mean to maintain it. I will trouble you no more, but tell you I do expect, as soon as they come to the House, you will send them to me; otherwise I must take my own course to find them." "After he had ended his speech," continues D'Ewes, "he went out of the House in a more discontented and angry passion than he came in, going out again between myself and the south end of the clerk's table, and the Prince Elector after him." Low mutterings of fierce discontent broke out as he passed along, and "many members cried out aloud, so as he might hear them, *Privilege! Privilege!*" With those words, ominous of ill, ringing in his ear, he repassed to his Palace through the lane, again formed, of his armed adherents, and amid audible shouts of as evil augury from desperadoes disappointed of their prey. Eagerly in that lobby had the word

He retires baffled.

Design of the attempted arrest.

been waited for, which must have been the prelude to a terrible scene. "For the design was," pursues Sir Simonds D'Ewes, writing at the close of his day's journal, "to have taken out of our House by force and violence the said five members, if we had refused to have delivered them up peaceably and willingly; which, for the preservation of the privileges of our House, we must have refused. And in the taking of them away, they were to have set upon us all, if we had resisted, in a hostile manner. It is very true that the plot was so contrived as that the King should have withdrawn out of the House, and passed through the lobby or little room next without it, before the massacre should have begun, upon a watchward by him to have been given upon his passing through them. But 'tis most likely that those ruffians, being about eighty in number, who were gotten into the said lobby, being armed all of them with swords, and some of them with pistols ready charged, were so thirsty after innocent blood as they would scarce have stayed the watchword, if those members had been there; but would have begun their violence as soon as they had understood of our denial, to the hazard of the persons of the King and the Prince Elector, as well as of us. For, one of them understanding a little before the King came out that those five gentlemen were absent, 'Zounds!' said he, 'they are gone! and we are never the better for our coming!'"[1]

Its critical nature.

'The arrest of the Five Members,' observes Mr. Forster, 'was the final stage of the struggle against the Grand Remonstrance. It was a violent effort to reverse the eleven votes by which the victory was achieved, and to constitute the leaders of the minority, to whom the highest offices in the State had meanwhile been given, masters of the House of Commons. When Charles and his armed attendants passed through the lobby of the House of Commons on the 4th of January, the Civil War had substantially begun. Clarendon himself admits as much when he

[1] Forster, Arrest of the Five Members, pp. 184, 200.

calls it "the most visible introduction to all the misery that afterwards befell the King and kingdom."'[1]

Question of the Militia.

The immediate question upon which the quarrel between King and Parliament untimately turned was the command of the Militia. Ireland was in a state of rebellion, and a large army was absolutely necessary to reduce that Kingdom to obedience. Justly persuaded of the utter insincerity of the King, and with the evidence before them of his intention to win back his authority at the sword's point, it would have been suicidal on the part of the Commons to place in the King's hands a military force which might, and probably would, have been used for their own overthrow. The Bill for regulating the Militia presented to the King in February, 1642, by which persons to be nominated by the Commons were to be entrusted with authority over the Militia of the Kingdom, was an undoubted encroachment upon the King's legal prerogative, unjustifiable perhaps as a permanent measure, but temporarily necessary and salutary in the crisis which the King himself had provoked. 'When this bill,' says Clarendon, 'had been with much ado accepted, and first read, there were few men who imagined that it would ever receive further countenance; but now there were very few who did not believe it to be a very necessary provision for the peace and safety of the kingdom. So great an impression had the late proceedings made upon them, that with little opposition it passed the Commons and was sent up to the Lords.'[2] The King's resolute refusal to pass the Bill led by rapid steps to the Civil War.

End of the Constitutional contest between Charles and his Parliament.

The Constitutional period of the great contest between the King and the Parliament may be said to have ended with the attempted arrest of the Five Members.

The Revolutionary period between 1642 and the Restoration of Charles II. in 1660—highly interesting and in-

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[1] Forster, Arrest of the Five Members, pp. 376, 377. 'The attempt to seize the five members was undoubtedly the real cause of the war.'—Macaulay, (Essay on Hallam's Const. Hist.) [Essays, 1862, i. 149].

[2] Clarendon, Hist. ii. 180.

The Revolutionary Period, 1642–1660.

structive to the student of Political History, but not strictly belonging to a work designed as a concise relation of the progress of the English Constitution—must necessarily be here passed briefly over. Within three years from the day when Charles raised the Royal standard at Nottingham (22 Aug., 1642), the Civil War was practically concluded. The crushing defeat of the King at Naseby (14 June, 1645), by the 'New Model' army under Fairfax and Cromwell, followed by the rout of Montrose's forces at Philiphaugh (13 Sept., 1645), reduced Charles to the position of a fugitive in his own kingdom, and made a frank acceptance of the least onerous terms which, after a fair negotiation, he could obtain from his victorious people, the only means by which he could ever regain the exercise of his Regal functions. The submission of English Kings to the will of their people was no new thing in the history of the Constitution. Even Edward the First, the greatest of the Plantagenets, had found it necessary to yield, and had yielded with loyalty and good faith. But the principle of conduct by which Charles was guided was the very opposite of that which the great Edward proclaimed in his motto '*Pactum Serva.*' Defeated in the field, he betook himself to intrigue and double-dealing, in the hope that by fomenting discord between the Scots and the English, between the Parliament and the Army, and by dexterously playing off one against the other, he might ultimately regain the enjoyment of Despotic power.

The great difficulty was the Religious one. Laud and Charles had endeavoured to establish a rigid ceremonial uniformity; the Parliament and the 'Westminster Assembly' of Divines (constituted 12 June, 1643) had substituted an equally rigid uniformity of narrow Calvinistic dogma; the adoption of the 'Solemn League and Covenant' by the English Parliament (25 Sept., 1643) had been exacted by the Scots as an indispensable preliminary to the aid which they rendered during the contest, and the maintenance of the Presbyterian system in England was still with them an object of paramount importance. On the other hand, the

victorious army of Fairfax and Cromwell, though composed of men of widely differing views on religious matters, were agreed, as a body, in protesting against the refusal of toleration by both Episcopalians and Presbyterians alike, and in a determination to secure for themselves, and for all others, except the Roman Catholics, religious freedom of thought and of speech.

After nearly three years of intermittent negotiation, when at length there seemed to be a possibility of an agreement with both Army and Parliament, on the basis of a Presbyterian Establishment for three years combined with a moderate measure of toleration, the King, in the midst of the negotiations at Newport, entered into a secret treaty with the Scots, binding himself to maintain the Presbyterian worship in England for three years and to suppress all other sects. In return, the Scots were to provide an army to replace him on the throne. In anticipation of the promised aid, the English Royalists rose in various parts of the country, and on the 5th of July, 1648, a Scottish Royalist army entered England under the command of the Duke of Hamilton. The English army under Cromwell and Fairfax promptly took the field; and the total defeat of Hamilton's forces near Preston on the 17th of August, followed by the surrender of Colchester, after a sharp siege, on the 27th of the same month, brought the second Civil War to a speedy close. Charles now returned to his old strategy of delusive negotiations with the Parliament; but for the Army, exasperated by the King's conduct and flushed with victory, the day of negotiation had passed.[1] To the fanatic belief of

The Engagement, 1648.

[1] It was Charles's ineradicable duplicity which caused all efforts at accommodation to fail. Even moderate men were oppressed with the feeling of utter distrust which his conduct inspired. In a curious pamphlet (preserved in the British Museum) entitled 'Ten Necessary Quæries touching the Personall Treatie. Very useful and necessary to be considered. By James Taswell, a true lover of King, Parliament, Truth and Peace. London: Printed by R. I. for A. H. 1648.,' the working of this feeling is well brought out. The pamphlet appears to have been issued about the end of July or the beginning of August, and has reference to the proposal to bring the King from the Isle of Wight to London for a 'personal treaty' in opposition to the vote of the House of Commons expressing their readiness

Taswell's 'Ten Necessary Quæries touching the Personall Treatie.' 1648.

Charles in his Divine Right to govern the nation as to him seemed best, was at length opposed the equally fanatic belief of a Bible-reading soldiery that it was their duty to see that 'Charles Stuart, the capital and grand author of

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to re-open negotiations, on condition that he should previously assent to three Bills revoking all declarations against the Parliament, establishing the Presbyterian worship for three years, and vesting the command of the army in certain persons for ten years. The writer, who, though a staunch Puritan, was evidently a moderate man, and most anxious for an agreement 'to heale our lande,' asks (*Query V.*) 'Whether the Parliament, under the notion of Rebells and Traytors, are in a capacity to treat with the King or not? and whether the King must not of necessity repute them free subjects before such a Treaty; and if of necessity that must be done before the treaty, whether the King may not, if he intend to doe it at all, do it as well in the Isle of Wight as when he commeth to London? And also why in these times of danger, the King should urge the Parliament to let him come first to treat before he signe (if he intended to be reall), and so desire the Parliament to run so great a hazard and taske? *Query VI.:* Whether if the Parliament should adventure all the blood and treasure which hath been hitherto expended, at this one cast, on the King's bare word (nay and he scarce passing that?), whether the Kingdome might not justly charge the Parliament with the breach of trust? *Query VII.:* Whether the King may not at his comming to his pretended Treaty, give commission, or onely intimate, which would be warrant enough for some of his violent headlong accomplices, whom we see are so inconsiderately eager to act for him, as that they would desire no better warrant than for his Majesty to hold up his finger to them; and so, whether this pretended Treaty may not bee made an opportunity to make a further breach with the Parliament? And whether there be not some just cause given for this doubt, by his Majesties unwillingnesse to afford the Parliament any kinde of security which lyeth in him to withhold from them? *Query VIII.* Whether it be not to be doubted that the King hath some unseen designe against the Parliament, in that he and his accomplices endeavour to remove themselves from under the protection of the Parliament? . . . And whether this action of his Majesty be not sufficient to cause the Parliament and their adherents to doubt whether the King hath such a desire to compose these differences by a personall Treaty, as many would make us believe he hath? . . . *Query IX.* Whether the Parliament, what dangers soever present themselves, are not bound in conscience, by reason of the trust imposed on them by the Kingdome, as also by their Oath and Solemne Covenant which they have taken, to stand with the hazard of their lives and fortunes for the maintenance and defence of that which appeareth unto their judgments and consciences to be most just and safe, from which if they should be deterred by threatning dangers, and so should embezzle the Subjects' priviledges, and bereave them of their right, whether it may not be a burden to their soules in the day of their accounts before Almighty God? *Query X.* Whether if the Parliament should by unexpected violence be surprised, whilst they lye under the brand of Rebellion and Treason, and the King set up by the sword? Whether, I say, they and all their adherents should not be forthwith proceeded against as Rebells and Traytors, they being already condemned by such as doubtlesse would as willingly proceed to execution, had they but power?' &c. These suspicions were not ill founded. Only a few months previously, during the negotiations at Hampton Court, the King had written to his wife: 'Be quite easy as to the concessions which I may grant; when the time comes, I shall very well know how to treat these rogues, and instead of a silken garter, I will fit them with a hempen halter.'—Clarendon, State Papers, ii. App. xxxviii.

all the troubles and woes that the kingdom had endured, should be speedily brought to justice, for the treason, blood, and mischief of which he had been guilty.'

Even before the illegal trial and execution of 'Charles Stuart, King of England' (30 Jan., 1648–9), the reins of government had passed alike from King, Lords and Commons, into the firm grasp of the leaders of the Army. After the 'purging' of the House of Commons by Colonel Pride, the remnant, about fifty Members in all, became a mere instrument for carrying out the will of the soldiery. When the few Peers who still continued to meet as the House of Lords refused to concur in bringing the King to trial, the truncated Lower House had assumed supreme authority by voting (Jan. 4) that the people being, after God, the source of all legitimate power, the Sovereign power in England resided in the Commons who had been elected by and represented the people. After the decapitation of the King, the House of Lords was within a few days voted 'useless and dangerous,' the Kingship abolished as 'unnecessary, burthensome, and dangerous,' and the old Constitutional form of government, gave place to the Commonwealth of England. At first, while the 'Rump' House of Commons continued to exercise the functions of a Parliament, the Executive power was vested in a Council of State[1] consisting of 41 persons, partly parliamentary, partly military. But the genius of Cromwell as a born 'ruler of men,' not less than the brilliant series of his military victories, culminating in the 'crowning mercy' of Worcester, soon caused the real executive power to be concentrated in his hands, even before it had been formally conferred upon him, with the title of 'Lord Protector,' by the Instrument of Government (16 Dec., 1653). There seems no reason to doubt that Cromwell aimed at establishing a form of

[Pride's Purge.] 5 Dec. 1648.

[1] The history of this body has been fully worked out by Mr. Andrew Bisset in his Omitted Chapter in English history. [Mr. Bisset distinguishes very strongly between the Parliamentary and the Cromwellian Councils of State, in favour of the former.—ED.]

government in which the nation would be ruled by the will of its elected representatives in Parliament, and under which all men (the Roman Catholic as yet excepted) should possess the great boon of religious freedom. But in practice he failed to carry out his ideal. Toleration was only partially conceded; and while the government was in form a Republic, it was in truth 'a despotism, moderated only by the wisdom, the sobriety, and the magnanimity of the despot.'[1] Justice between man and man seems to have been administered as fairly as, if not more fairly than, under the Monarchy, but between the Government and the subject arbitrary rule prevailed. After the Royalist rising at Salisbury (March 1655), when the Judges on circuit were seized and even threatened with hanging, the country was mapped out into military districts, under the command of Major-Generals, by whom every insurrectionary movement was immediately suppressed and punished. The death of Cromwell (3 Sept. 1658), and the weakness of his son and successor in the Protectorate, exposed the nation to the danger of being ruled by a succession of petty military despots; and almost all parties, postponing their differences, political and religious, welcomed back the Stuart dynasty and the old Civil Polity of the kingdom. But although the legal Constitution had been suspended during this period, and revived again at the accession of Charles II., the Great Rebellion of the English nation could not fail to produce certain permanent Political and Constitutional results.[2] These may be summed up under the following heads:

[*Political and Constitutional*] *Results of he Revolutionary Period.*

[*Cause of Absolute Monarchy lost.*]

1. Although the cause of Monarchy was gained, that of *Absolute* Monarchy was lost for ever. Henceforth Royalists and Revolutionists alike regarded the close union and mutual

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[1] Macaulay, Hist. i. [137].

[2] 'Of course, in seeming, Cromwell's work died with him; his dynasty was rejected, his republic cast aside; but the spirit which culminated in him never sank again, never ceased to be a potent, though often a latent and volcanic, force in the country. Charles II. said that he would never go again on his travels, for anything or anybody; and he well knew that though the men whom he met at Worcester might be dead, still the spirit which warmed them was alive and young in others.'—Bagehot, Eng. Const. (2nd ed.) p. 282.

interdependence of Kings and Parliaments as necessary for the good government of the country.

2. The predominant influence of the House of Commons in the government of the nation was permanently established, and has ever since been growing more and more marked and decisive. The overthrow of the Crown and the House of Lords had been so violent and complete, that the unqualified restoration of their rights and dignity failed to reinstate them in their ancient ascendancy. The Royalist House of Commons of Charles II., in its relations to the Crown and the administration of the country, inherited, defended, and transmitted to its successors, the conquests of the Long Parliament.[1]

[*Predominant influence of House of Commons established.*]

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[1] A singular proof of the influence of the Commons under Charles II. is furnished by the result of the famous controversy between the two Houses as to the original jurisdiction of the Lords in the case of *Skinner* v. *The East India Company.* The Lords having entertained a petition of Skinner against the Company, overruled the defendants' plea to the jurisdiction, and condemned them to pay the plaintiff £5,000, the Company presented a complaint to the House of Commons. The Commons resolved 'that the Lords, in taking cognizance of an original complaint, and that relievable in the ordinary course of law, had acted illegally, and in a manner to deprive the subject of the benefit of the law.' The Lords, in return, voted, 'That the House of Commons entertaining the scandalous petition of the East India Company against the Lords' House of Parliament, and their proceedings, examinations, and votes thereupon had and made, are a breach of the privileges of the House of Peers;' and that their own proceedings in Skinner's case had been 'agreeable to the laws of the land, and well waranted by the law and custom of Parliament, and justified by many Parliamentary precedents ancient and modern.' After two conferences between the Houses had failed to produce an amicable settlement of the dispute, the Commons voted Skinner into custody for a breach of privilege, and resolved that whoever should be aiding in execution of the order of the Lords against the East India Company should be deemed a betrayer of the liberties of the Commons of England and an infringer of the privileges of the House. The Lords, in return, committed to prison Sir Samuel Barnardiston, Chairman of the Company, and a member of the House of Commons, and imposed on him a fine of £500. By successive adjournments and prorogations the King managed to stop the course of the quarrel during fifteen months. But at the meeting of Parliament in 1669, the Commons renewed the dispute. Ultimately, the King recommended an erasure from the Journals of all that had passed on the subject, and an entire cessation,—an expedient which both Houses willingly embraced: and from this time the Lords have tacitly abandoned all pretensions to an original jurisdiction in Civil suits. The Houses also came into collision on account of what was deemed a breach of privilege in the citation of members of the Commons to appear before the Lords as respondents in Chancery appeals. The most celebrated case is the appeal of Shirley against Sir John Fagg, in 1675, which gave rise to much intemperate behaviour on both sides, and induced the Commons to vote that there lies no appeal to the judicature of the Lords in Parliament from Courts of Equity. The dispute was at length only put an end

Collisions between Lords and Commons under Charles II.

Skinner v. *East India Company.* [1668–9.]

Shirley v. *Fagg.* [1675.]

[*Definitive rejection of Romanism.*]

3. The complete and definitive rejection of Romanism in England was assured; but the position of the National Church after the Restoration was no longer precisely the same as before the Rebellion. Down to the time of the Commonwealth the Church had never ceased, in legal theory and to a great extent in actual fact, to be co-extensive with the nation. At its deliberate and formal re-establishment by Charles II. and his Parliament, it was patently the Church not of the whole nation but of a majority only. Thenceforward, as the other religious communities have gradually attained first to toleration and then to Civil equality with the members of the National Church, the Ecclesiastical constitution, whilst still in theory national, has gradually come to be regarded not so much as the National Church (which legally it still continues to be), as the 'Established' Church, using the word 'Established' in its modern signification, as denoting a religious body standing in a special relation to the State in contradistinction from all other religious bodies.[1]

[*Antipathy to Standing Armies.*]

4. Another important result of the revolutionary crisis through which the nation had passed was the development of an intense national antipathy to a standing army, and of a wide-spread distrust of men of extreme views.

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to by the long prorogation from November, 1675, to February, 1677. The particular appeal of Shirley was never revived; but the Lords continued without objection to exercise their general jurisdiction over appeals from Courts of Equity. Under Charles II., also, the Commons, in 1671, successfully resisted the right of the Lords to amend Money-Bills (*supra*, p. 598, *n.* 1). Hallam, Const. Hist. iii. 30.

[1] See Guizot, English Revolution; and Freeman, Disestablishment and Disendownment.

[On the Religious as well as the Political attitude of the Commons *t.* Car. I., cf. Burrows' *Parliament and the Church of England*, c. ii., where it is strongly urged that the Commons were practically the only 'representative of the lay voice of the Nation:' *op. cit.* p. 47. On the history and meaning of the phrases Establishment and Established Church, and the sense in which the Church of England may be regarded as Established, cf. Pt. ii. of Brewer's *Church of England*, ed. by L. T. Dibdin.—ED.]

CHAPTER XV.

THE STUART PERIOD.

III. FROM THE RESTORATION TO THE PASSING OF THE BILL OF RIGHTS (1660—1689).

CHARLES II. 1660–1685.

THE reign of Charles II.[1] has been epigrammatically described as the 'era of good laws and bad government;'[2] but whilst the bad government was continuous, the good laws appeared only at intervals amidst many others of a violent and questionable character. We shall briefly consider the principal statutes of Constitutional importance.

Chief Constitutional statutes of his reign.

Abolition of military tenures.

During the Commonwealth the vexatious emoluments derived from the military tenures had been suspended, and at the Restoration the feeling was unanimous in favour of abolishing those intolerable Feudal burthens which had so long survived their original *raison d'être*. By the 12 Car. II. c. 24, it was enacted that the Court of Wards and Liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeiture of marriages, by reason of any tenure of the King's Majesty, or of any other, by knight service, and all other gifts, grants, or charges incident or arising therefrom, be totally taken away, from the 24th of February, 1645 (the date of the intermission of the Court of Wards by the Long Parliament): And that all fines for alienation, tenures by homage, knight service, and escuage, and also aids for

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[1] By a legal fiction, the first year of Charles II.'s reign was called the twelfth; King *de jure*, on the death of Charles I., 20 January, 1648–9; King *de facto*, at the Restoration, 29th May, 1660.

[2] Fox, Reign of James II. p. 22.

marrying the King's daughter or knighting his son, and all tenures of the King *in capite*, be likewise taken away :[1] And that all sorts of tenures, held of the King or others, be turned into *free and common socage*, save only tenures in frankalmoign, copyholds, and the honorary services of grand serjeanty.[2] By the same statute the famous rights of purveyance and pre-emption were also finally abolished. The immediate and direct benefits conferred by this Act constituted a grateful boon to the landowners of the kingdom, and, so far as regards the abolition of purveyance, to the nation at large. Indirectly, too, the whole nation gained by the simplification of tenure, and more especially by the 'important change in the spirit of our constitution,' which Hallam has noted as a consequence of the curtailment, by this statute, of the prerogative of the Crown, which 'by its practical exhibition in these two vexatious exercises of power, wardship and purveyance, kept up in the minds of the people a more distinct perception, as well as more awe, of the monarchy, than could be felt in later periods, when it has become, as it were, merged in the common course of law, and blended with the very complex mechanism of our institutions.'[3] In

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[1] For the incidents of Feudal tenure, see *supra*, p. 64. Hargrave (Co. Litt. by Hargrave, 108, n. 5) considers this mention of tenures *in capite* to have been a mistake by the framers of the Act. 'It is, at all events, certain that the enactment was not intended to prohibit persons from holding immediately under the Crown. Indeed, it is in this manner that land in fee is now most usually held.'—Stephen, Comm. (5th ed.) i. 209, n. *g*.

[2] [Such are the tenures by which the manor of Woodstock is held by the Duke of Marlborough, rendering on the second day of August in every year for ever, at the Castle of Windsor, one standard of colours, with flower-de-luces painted thereupon, and the Strathfieldsaye estate by the Duke of Wellington, viz., the 'annual rendering to the Sovereign of a flag bearing the Royal arms, on the anniversary of the Battle of Waterloo.' For the Duke of Marlborough's tenure, see *Woodstock Manor* (Oxford and London. 1873), by Rev. E. Marshall, M.A. Mr. Marshall prints a contemporary Specification as well as the operative parts of the 3 & 4 Anne, c. 4 (or 6), which enabled the Crown to grant the Royal manor of Woodstock in perpetuity, contrary to the previous legislation of the same reign. For the tenure of Strathfieldsaye, see Burke's *Peerage*, *s. v.* Wellington. A certain amount of confusion in the minds of the draftsmen of the 12 Car. II., c. 24, is pointed out by Digby, *Hist. of Law of Real Property*, p. 352. For Grand Serjeanty, cf. Digby, *op. cit.*, pp. 38, 355.—ED.]

[3] Hallam, Const. Hist. ii. 311.

consideration of the surrender of these Feudal privileges by the Crown, the Parliament resolved to make up the Royal revenue to the annual sum of £1,200,000. As the landed gentry were the great gainers by the surrender, they ought, in justice, to have been subjected to some compensatory tax: and a proposal was made that a permanent tax should be laid on lands held in chivalry, which, as distinguished from those held in socage, had been alone liable to the Feudal burthens. But being powerful in Parliament, the landowners succeeded, though only by the small majority of two, in substituting a hereditary Excise on beer and some other liquors, thus transferring their own particular burthen to the community at large.[1]

Hereditary Excise granted in exchange.

By the 13 Car. II. st. 1, c. 5, it was enacted that no petition to the King or either House of Parliament for alteration of matters established by law in Church or State (unless the contents thereof had been previously approved, in the country by three Justices of the Peace or the Grand Jury of the county, and in London by the Lord Mayor, Aldermen, and Common Council), should be signed by more than twenty, or delivered by more than ten, persons, under penalty in either case, of £100 fine and three months' imprisonment.

Act against tumultuous petitioning. 1661.

The right of petitioning the Crown and Parliament is one of the most valuable possessed by the subject, and seems to have been exercised from the earliest times. But for many centuries it was practically restricted to petitions for redress of private and local grievances, and the remedies prayed for were such as have since been provided by Courts of Equity and by private Acts of Parliament. The practice of petitioning on political subjects came into vogue during the period of the Great Rebellion, many peti-

Right of the subject to petition the Crown and Parliament.

Its historical development.

[1] The Excise was not a newly invented tax, having been originally imposed by the Long Parliament in 1643. [The introduction of the Excise into England was anticipated and feared, says Dowell, as early as the reign of James I., as it had been a success in the Low Countries, and James was a known imitator of Continental systems of taxation. *Hist. of Taxation in England*, i. p. 217.—ED.]

tions, signed by large bodies of people, being presented both to Charles I. and the Long Parliament; and it was probably the recollection of the intimidation exercised by numerous bodies of petitioners in the early days of the Long Parliament which prompted this restraining Act of Charles II. In December, 1679, in consequence of the dissatisfaction of the nation at the repeated prorogations, great exertions were made to get up numerously signed petitions to the King for the assembling of Parliament. A Royal Proclamation was thereupon issued, forbidding all persons to sign such petitions under pain of punishment. This, though it checked, did not entirely prevent the presentation of these petitions. Counter-addresses were therefore sent up to the Throne from Grand Juries, magistrates, and many corporations, expressing their *abhorrence* of the petitions for the assembling of Parliament; whence the two principal parties in the country subsequently distinguished as Whigs and Tories, obtained for the time the names of Petitioners and Abhorrers. By the Bill of Rights the right of the subject to petition the King was expressly sanctioned; but the House of Commons for a long time showed itself intolerant of a free expression of opinion, and extremely jealous of any semblance of interference with its functions. In 1701 the Commons imprisoned five of the Kentish Petitioners until the end of the session, for praying the House to attend to the voice of the people and turn its loyal addresses into Bills of Supply. Any petition expressing opinions of which the majority of the House did not approve was liable to summary rejection. In 1772, a most temperate petition signed by about 250 of the clergy and by several members of the professions of Law and Physic, praying for relief from subscription to the Thirty-nine Articles, was rejected by a large majority of the Commons. Seven years later, however, in 1779, a widely organised attempt to procure Parliamentary and economical reform gave rise to a general system of petitioning, in which the freeholders of Yorkshire led the way and were soon followed by many other important counties

and by the principal cities. 'This,' observes Sir Erskine May, 'may be regarded as the origin of the modern system of petitioning, by which public measures, and matters of general policy, have been pressed upon the attention of Parliament. Corresponding committees being established in various parts of the country were associated for the purpose of effecting a common object by means of petitions, to be followed by concerted motions made in Parliament. An organization which has since been so often used with success was now first introduced into our political system.'[1] The great movement for the abolition of the Slave Trade, which began with a petition from the Quakers in 1782, affords the most remarkable example of the direct influence of petitions upon the deliberations of Parliament. But it was not until the latter part of the reign of George IV. that petitioning obtained the development which has since distinguished it in all the great political movements. Not only is the right to petition now fully recognised, but 'the act of petitioning is free to all, and Parliament will receive any petition respectfully worded, and complying with the forms of the House, whilst the Statute of 13 Car. II. has nearly become a dead letter, and under ordinary circumstances no one dreams of enforcing that Act (intended to prevent violent and tumultuous petitioning), or of inquiring, when a petition is presented, whether its conditions have been complied with.'[2]

Appropriation of supplies.

In the session of 1665 the Commons took advantage of the necessity under which the King lay, of asking for ex-

[1] May, Const. Hist. ii. 63 *seq.*

[2] [Denman's Broom's *Const. Law*, p. 511.—ED.] It was, however, expressly decided by Lord Mansfield, on the trial of Lord George Gordon for his share in the 'No Popery' riots of 1780, that the Act of Car. II. had not been repealed; and it was cited in 1848, when it was found necessary to prohibit the large body of Chartist pétitioners from carrying out their declared intention of marching to the House to present their petition. [This Act has also been relied upon, it is believed, very recently, in connection with tumultuous gatherings anticipated in the immediate neighbourhood of the Houses of Parliament. Cf. *Law Magazine and Review*, No. cclxviii., for May, 1888, Art. *Trafalgar Square*, by B. L. Mosely, LL.B., and No. cclxix., for August, 1888, Art. *New Phases of Trafalgar Square.*—ED.]

traordinarily large grants for the prosecution of the Dutch war, to establish the important principle of appropriating the supplies to specific purposes. Sir George Downing, one of the Tellers of the Exchequer, introduced into the Subsidy Bill granting the sum of £1,250,000 for the war with Holland,[1] a proviso that all moneys raised by virtue of that Act should be solely applicable to the service of the war, and should not be issued out of the Exchequer except by order or warrant mentioning that they were payable for such service. Despite the furious opposition of Clarendon, who stigmatised the proviso as derogatory to the honour of the Crown, Charles himself insisted upon this restraint on the Executive power, having been persuaded that the bankers would be more easily induced to advance the money, in anticipation of the Revenue, upon this better security for speedy repayment.[2] The principle of appro-

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[1] 17 Car. II. c. 1.

Growth of the National Debt.

[2] The commencement of the National Debt dates from the reign of Charles II. During the Civil War large sums of money were deposited, for safe custody, with some of the most eminent London goldsmiths, who, after the Restoration, continued to act in their new capacity as bankers, and began to advance money to the national Exchequer on the security of an assignment of some branch of the public revenue. Down to 1672 these loans were always punctually repaid; but in that year, at the outbreak of the Dutch war, Charles II. was persuaded by the Cabal administration to issue a Proclamation forbidding the payment of any money out of the Exchequer due upon existing securities, but promising, instead, to add the interest then due to the capital and to allow 6 per cent. interest on this new stock. By this iniquitous proceeding, which caused several bankers to fail, and reduced many of their customers to the deepest distress, the King acquired the disposal of about £1,300,000. Interest was paid down to the year 1683, when even this was stopped: and nothing was done for the public creditor until 1699, when an Act was passed (which was not to take effect till December 25, 1705) charging the Excise with payment, from the latter date, of 3 per cent. interest on the principal sum of £1,328,526, redeemable on payment of a moiety, but no compensation was made for the loss of twenty-two years' arrears of interest.

Bank of England established, 1694.

Five years previously, in 1694, the sum of £1,200,000 at 8 per cent. interest had been borrowed by the Government from a body of merchants, who, in return, received the privilege of incorporation, by Royal Charter, as 'The Governor and Company of the Bank of England.' The charter was originally granted for only eleven years certain, Parliament reserving the right to redeem the debt at any time after 1705, upon giving a year's notice; and with the redemption of the debt the charter was to expire. But far from paying off old debts, new loans were from time to time raised by the Government in a similar manner, and the Bank Charter has been prolonged by several renewals. At the end of William III.'s reign the National Debt amounted to over £16,000,000; under Queen Anne it reached the sum of £54,000,000. The Spanish War, which commenced in 1739, added £31,300,000; and in 1763, after the Seven Years' War, the debt amounted to £146,000,000. The American War of

priating the supplies was by no means a novelty in the Constitution, but it had only been put into practice occasionally and at long intervals.[1] The complete authority exercised by the Commons, during the late Civil War and the Commonwealth, over the whole receipts and expenditure of the national treasury, had accustomed the House to regulate the disbursement of the sums which they granted; the advantage to the nation from their control of its finances was self-evident; and from the date of the Appropriation Act of Charles II. it became 'an undisputed principle, recognised by frequent and at length constant practice,' that 'supplies granted by parliament are only to be expended for particular objects specified by itself.'[2] The principle of appropriation was not, however, carried into full effect till after the Revolution. But from the reign of William III. it has been the invariable usage to insert a clause in the annual Appropriation Act prohibiting, under

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Independence increased the debt by £121,000,000; and £601,000,000 was added during the great French War, at the close of which it had reached the enormous total of £840,850,491, involving an annual expenditure for interest and management, of £32,038,191.

Attempts to reduce the debt.

The apprehensions excited by the steady advance of the debt caused efforts to be made at an early period for its reduction. Sir Robert Walpole instituted a Sinking Fund, of which great hopes were entertained, and under the operation of which the capital amount had been reduced by about £7,000,000 prior to the outbreak of the Spanish War in 1739. Some further slight reductions were made during subsequent intervals of peace, and in 1786 Mr. Pitt established his famous permanent Sinking Fund of £1,000,000 a year, which was perseveringly maintained for many years, even when it was necessary to contract fresh loans for that purpose. Since 1829 the absurdity of paying off the debt by borrowing has been abandoned, and only surplus annual revenue has been applied in the reduction of the debt. By an Act passed in 1875, provision has been made for its gradual reduction by means of a new permanent Sinking Fund, maintained by annual votes.

[Since the third edition of the present work, Rt. Hon. G. J. Göschen has marked his tenure of the Chancellorship of the Exchequer by great changes in Consols, a new 2¾ per cent. stock having taken the place of the old 3 per cent., under the familar appellation of 'Göschens,' and the India 4 per cent. Stock has been converted into 3½ per cent. stock, the ultimate object being, presumably, the extinction of the National Debt by gradual reductions. Whether this extinction will ever really take place may perhaps be doubted, and how far such extinction, if accomplished, would prove worth the accomplishment may perhaps also be open to question.—ED.] Cf. Earl Russell, Eng. Gov. and Const. 225; Hallam, Const. Hist. iii. 132, 212; Macaulay, Hist. i. 169; and the Statesman's Year Book (by F. Martin) for 1879 [on the subject generally].

[1] *Supra*, pp. 286, 299, 324.

[2] Hallam, Const. Hist. ii. 355–6.

severe penalties, as well the Lords of the Treasury from issuing, as the officers of the Exchequer from obeying, any warrant for the expenditure of money in the national Exchequer upon any other service than that to which it has been specifically appropriated. The permanent establishment of the principle and practice of appropriation 'has given the house of commons,' remarks Hallam, 'so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence; nor can the session of Parliament be intermitted for an entire year, without leaving both the naval and military force of the kingdom unprovided for. . . . It is to this transference of the executive government (for the phrase is hardly too strong) from the Crown to the two houses of parliament, and especially the commons, that we owe the proud attitude which England has maintained since the Revolution, so extraordinarily dissimilar in the eyes of Europe, to her condition under the Stuarts. The supplies, meted out with niggardly caution by former parliaments to sovereigns whom they could not trust, have flowed with redundant profuseness when they could judge of their necessity and direct their application.'[1]

Commission of public accounts.

In the session of 1666, the demand of large additional supplies for the Dutch war, coupled with the indifferent success which had attended the military operations, provoked suspicions of the dishonest appropriation of the money previously voted. The Commons appointed a committee to inspect the accounts of the officers of the Navy, Ordnance, and Stores, and subsequently sent up a Bill appointing Commissioners to inspect the public accounts, with full powers to enquire and report as to such persons as they should find to have broken their trust. While this measure was impending, the King prorogued Parliament, but promised to issue a Royal Commission for the examination of

[1] Const. Hist. iii. 116–7.

the accounts. In the following session, 1667 (Lord Clarendon having fallen in the interval), the Commons re-introduced their Bill, which passed as 'An Act for taking the accounts of the several sums therein mentioned.'[1] Commissioners (who were to report from time to time to the King and both Houses of Parliament) were nominated in the Act and invested with most extensive powers, not only for auditing the public accounts, but for investigating frauds in the expenditure of money and employment of stores. They were authorised to examine upon oath, to summon inquests, to commit to prison without bail all persons disobeying their orders, and to determine finally on the charge and discharge of all accounts; and upon a certificate of their judgment the Barons of the Exchequer were directed to issue process for recovering money to the King's use, as if there had been an immediate judgment of their own Court.[2] The passing of this statute marked a further step in that transfer of the control of the Executive administration from the Crown to the House of Commons, which, throughout the long existence of the 'Pensionary' Parliament of Charles II., was quietly but steadily proceeding.

Habeas Corpus Act 1679.

Of all the statutes passed in the reign of Charles II. perhaps the most celebrated is the Habeas Corpus Act. But although this Act afforded to the subject a prompt and efficacious remedy in many cases of illegal imprisonment, it is a mistake to suppose that it introduced any new principle or conferred any new right.

Ancient remedies for illegal detention.

The right of personal liberty—the most precious of all rights—is as old as the Constitution itself. It rests upon the Common Law, which was merely defined and declared by Magna Charta and the stream of statutes which affirm that enactment. The subject was therefore always legally

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[1] 19 Car. II. c. 9.

[2] Hallam, Const. Hist. ii. 358–9. A great deal of abuse and misapplication of the public revenues were brought to light by the commission; and at the next meeting of Parliament, in October, 1669, Sir George Carteret, Treasurer of the Navy, was expelled the House for issuing money without legal warrant.—*Ibid.*

free from detention except upon a criminal charge or conviction, or for a civil debt. Besides the ancient writs *De odio et atiâ* and *De homine replegiando* (which were available only in particular cases),[1] any freeman imprisoned was entitled at Common Law to demand of the Court of King's Bench a writ of *habeas corpus*, or *corpus cum causâ* as it was called, directed to the keeper of the prison, and commanding him to bring up the body of the prisoner, with the cause of the caption and detention, in order that the Court might judge of its sufficiency, and either remand the prisoner, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and *ex debito justitiae*, and could not be denied. It possessed, however, various defects. 1. The gaoler was not bound to make an immediate return to the writ, but might wait for a second writ called an '*alias*,' and a third, a '*pluries*'; and other expedients, such as shifting the prisoner about from prison to prison, were sometimes adopted in order to evade obedience. 2. It was doubtful whether the Court of Common Pleas could issue this writ; and the Court of Exchequer seems never to have done so. It was also doubtful whether a single Judge of the Court of King's Bench could issue it during the vacation.

Inadequacy [of the ancient remedies].

These defects caused much delay in obtaining the writ; but a more serious matter was the attempt made by the Crown to defeat the right altogether, by maintaining that the 'special command of the King' was *per se* a sufficient cause to justify the commitment and detention of a subject. This vitally important point was, as we have seen, elaborately argued in Court and in Parliament, in the great case of the Five Knights (*Darnel's case*) in 1627, and was intended to have been settled by the Petition of Right which declared against it.[2] The arbitrary arrest of Sir John Eliot, Selden, and other Members, on the dissolution of Parliament in 1629, and the attempt made to evade the words of

[1] *Supra*, pp. 127, 137.
[2] *Supra*, pp. 561, 563, 569.

the Petition of Right by setting forth in the warrant and in the return to the *habeas corpus* a colourable cause of commitment, 'notable contempts of the King and government and stirring up sedition,' led to the enactment of the remedial clauses concerning the writ of *habeas corpus* contained in the Act which abolished the Star Chamber.[1]

Under Charles II. the arbitrary conduct of Lord Clarendon, in procuring political offenders to be illegally imprisoned in distant and unknown places, directed public attention to the necessity for a more speedy and effective process of enforcing the subject's right to personal liberty.[2] In April, 1668, a Bill to prevent the refusal of the writ of *habeas corpus* was introduced in the House of Commons, but did not pass through committee. In March, 1670, another Bill to the same effect was sent up to the Lords, but fell through. In the session of 1673-74, the Commons passed two Bills—one to prevent imprisonment in gaols beyond the seas, the other to give a more expeditious use of the writ of *habeas corpus* in Criminal matters. These appear to have failed in the Upper House, as similar Bills were sent up to the Lords in 1675, and with a like result. In 1676 the delay and difficulty in procuring a *habeas corpus* were forcibly exemplified in the case of Francis Jenkes, a citizen of London. He had delivered a speech at the Guildhall urging that a Common Council should speedily be held to petition the King, in the name of the City, to call a new Parliament. For this he was summoned before the Privy Council and committed to prison. Various attempts were unsuccessfully made to obtain his enlargement. The Court of Quarter Sessions for Westminster refused to admit him to bail, on the plea that he had been committed by a superior Court; or to try him, because he was not entered in the calendar of prisoners. The Lord Chancellor, on being applied to for a *habeas corpus*, refused to issue it during the vacation; and the Chief Justice of

Abortive attempts at a remedy.

Jenkes's case, 1676.

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[1] 16 Car. I. c. 10. *Supra*, pp. 578, 607.
[2] *Supra*, p. 545, *n.*

the King's Bench, to whom in the next place recourse was had, made so many difficulties that Jenkes lay in prison many weeks before he was eventually enlarged on bail.

The Act of 1679.

At length, in 1679, three years after the proceedings in Jenkes's case, the famous Habeas Corpus Act was passed. It is intituled 'An act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas,' and it is restricted to the case of persons imprisoned (before sentence) for 'criminal or supposed criminal matters.'

Provisions of the Habeas Corpus Act, 1679.

It enacts:—(1) That on complaint and request in writing by or on behalf of any person committed and charged with any *crime* (unless committed for treason or felony plainly expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact to any petit treason or felony; or upon suspicion of such petit treason plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process) the Lord Chancellor or any of the Judges in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two whole terms after his imprisonment to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the Judges. And upon service thereof the officer in whose custody the prisoner is shall bring him before the said Lord Chancellor or other Judge, with the return of such writ and the true cause of the commitment; and thereupon, within two days after the party shall be brought before them, the said Lord Chancellor or other Judge shall discharge the prisoner, if bailable, upon giving security, in any sum according to their discretion having regard to his quality and the nature of his offence, to appear and answer to the accusation in the proper course of judicature. (2) That such writs shall be endorsed as granted in pursuance of this Act, and signed by the person awarding the same. (3) That the writ shall be returned, and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days after service of the writ. (4) That officers

and keepers neglecting or refusing to make due returns, or not delivering to the prisoner or his agent within six hours after demand a true copy of the warrant of commitment or shifting the custody of the prisoner from one to another, without sufficient reason or authority (specified in sec. 8 of the Act), shall for the first offence forfeit £100, and for the second offence £200 to the party grieved and be disabled to hold his office. (5) That no person once delivered by *habeas corpus* shall be re-committed for the same offence, on penalty to the party of £500. (6) That every person committed for treason or felony, shall, if he requires it, the first week of the next term, or the first day of the next session of *oyer* and *terminer*, be indicted in that term or session, or else admitted to bail, unless it appear, upon oath made, that the King's witnesses cannot be produced at that time; and if acquitted, or not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed from the common gaol by *habeas corpus* till after the assizes are ended, but shall be left to the justice of the Judges of assize. (7) That any such prisoner may move for and obtain his *habeas corpus* as well out of the Chancery or Exchequer as out of the King's Bench or Common Pleas; and the Lord Chancellor or Judges denying the same, on view of the copy of the warrant, or oath that such copy is refused, shall forfeit severally to the party grieved the sum of £500. (8) That this writ of *habeas corpus* shall run into the Counties Palatine, the Cinque Ports, and other privileged places, and the islands of Jersey and Guernsey. (9) That no inhabitant of England (except persons contracting, or convicts praying, to be transported, or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, Tangier,[1] or any

[1] The fortress of Tangier in Africa (together with the island of Bombay) was acquired by Charles II., in 166[1], as a portion with his wife Katherine of

places beyond the seas within or without the King's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than £500, to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *praemunire;* and shall be incapable of receiving the King's pardon for any of the said forfeitures, losses, or disabilities.[1]

Its defects.

Such is the substance of this great and important statute. It was subject, however, to three defects. (1) It fixed no limit on the amount of bail which might be demanded. (2) It only applied to commitments on Criminal or supposed Criminal charges; all other cases of unjust imprisonment being left to the *habeas corpus* at Common Law as it subsisted before this enactment. (3) It did not guard against falsehood in the return.

Remedied by Bill of Rights, 1689.

The first of these defects was remedied in 1689, by the Bill of Rights, which declared 'that excessive bail ought not to be required.' The other two (notwithstanding a serious attempt in 1757 to render the *habeas corpus* at Common Law more efficient) subsisted down to the year 1816, when they were at length removed by 'An Act for more effectually securing the liberty of the subject' (56 Geo. III. c. 100). By this Act, in addition to various minor but important improvements, the statutable remedy was extended to cases of imprisonment on non-criminal

56 Geo. III. c. 100, 1816.

Braganza. It was abandoned in 168[4]. [For the history of Tangier as a British possession, cf. *The History of the Second Queen's Royal Regiment*, by Lt.-Col. Davis, F.S.A., vol. i. Lond. 1887, and *The Moors Baffled: A Discourse concerning Tangier . . . under the government of . . . Andrew, Earl of Teviot, Lord Rutherfurd* (Preface signed by George, Lord Rutherfurd, *i.e.*, George Durie of Grange, styling himself Lord Rutherfurd), 2nd ed. Edinb. 1738. It appears from Col. Davis's researches, *op. cit.*, i. 11–17, that the commission, printed *loc. cit.*, of the Earl of Peterborough, the first British Governor of Tangier, was dated 6th Sept., 1661, and that the last British Governor, the Earl of Dartmouth, left Tangier Roads, on the completion of the evacuation, not till on or after 7th March, 1683–4, the date of the final Muster of Troops on board the *Grafton*, which carried the Governor, Pepys agreeing with this in his Journal of his voyage from Tangier to England, March 5–15, 1683–4, cited by Col. Davis, *op. cit.*, i. 252, from Smith's *Life of Pepys*, ii. 33.—ED.]

[1] 31 Car. II. c. 2; and see Stephen, Comm. (5th ed.) iv. 25.

charges, and the Judges were empowered to examine and determine the truth of the facts set forth in the return, and in all cases of doubt to bail the prisoner.

25 & 26 Vict. c. 20, 1862.

The legislation in regard to the writ of *habeas corpus* terminates with the Act 25 & 26 Vict. c. 20 (passed in consequence of the decision of the Court of Queen's Bench in *Anderson's case*,[1] where the writ was issued into Upper Canada), which provides: That 'no writ of *habeas corpus* shall issue out of England by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown where her Majesty has a lawfully established court or courts of justice, having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion.'

Acts against Nonconformists.

In contrast with the beneficial legislation which we have been considering, is the series of odious acts against the Nonconformists passed by the 'Cavalier' or 'Pensionary' Parliament of Charles II. This Parliament—'the Long Parliament of the Restoration,' which lasted from May 8th, 1661, to January 24th, 1679—was, during the first few years of its existence, 'more zealous for royalty than the King, more zealous for episcopacy than the bishops.'[2] As the terror from the late Civil War abated it gradually threw off its exuberant loyalty, and though its leaders were corrupt, they were too much alive to their own interests ever to sacrifice any Parliamentary power. But the devoted attachment to the Established Church and the hatred of sectaries, which distinguished its earlier sessions continued unabated to the last.

Corporation Act, 1661.

By the 'Act for the well-governing and regulating of Corporations' (13 Car. II. st. 2, c. 1) a Religious test was combined with a Political test. All corporate magistrates and office-bearers were obliged to take 'the Sacrament of the Lord's Supper, according to the rites of the Church of England,' to renounce the solemn League and Cove-

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[1] 30 Law Journ. Rep. Q. B. 129.
[2] Macaulay, Hist. i. [176].

nant, and to swear that they believed it unlawful, on any pretence whatever, to take arms against the King, and that they abhorred the 'traitorous position' of bearing arms by his authority against his person or his officers. 'These provisions,' remarks Hallam, 'struck at the heart of the presbyterian party, whose strength lay in the little oligarchies of corporate towns, which directly or indirectly returned to parliament a very large proportion of its members.'[1] But they equally affected all other Nonconformists, and established an inequality of Civil rights between Churchmen and Dissenters which continued down to our own day.[2] The Political test contained in the Corporation oath of *non-resistance*, having been practically renounced at the Revolution, was abolished in 1718, shortly after the accession of the House of Hanover, by the 'Act for quieting and establishing corporations' (5 Geo. I. c. 6, s. 2). The Religious test was not repealed till the reign of George IV.[3]

Test Act, 1673.

The famous Test Act (25 Car. II. c. 2) was passed in 1673, 'for preventing dangers which may happen from Popish recusants.' It was provoked by the 'Declaration of Indulgence,' recently issued by the King, dispensing with the laws against Nonconformity. This Declaration, though apparently a concession to the Protestant Dissenters, was really intended as a step towards the re-establishment of the Roman Catholic religion, in which the Duke of York was an avowed, Charles an unavowed believer. By the secret Treaty of Dover, in 1670, the King, his brother, and Louis XIV. of France, had entered into a Royal conspiracy against the National Church and Civil liberties of England. The precise terms of this

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[1] Hallam, Const. Hist. ii. 328.

[2] [The distinction between the two classes of oppressive legislation embodied in the Corporation and Test Acts is briefly but clearly shewn by Mr. B. C. Skottowe, M.A., in *Our Hanoverian Kings*, 1884, pp. 139–41, where the political character of the repression of the Roman Catholic subjects of th Crown is pointed out, with the reference which it bore to European as well as to Home politics.—ED.]

[3] 9 Geo. IV. c. 17 (1828).

Treaty were not then indeed authentically known, 'but there can be no doubt,' says Hallam, 'that those who from this time displayed an insuperable jealousy of one brother, and a determined enmity to the other, had proofs enough for moral conviction of their deep conspiracy with France against religion and liberty. This suspicion is implied in all the conduct of that parliamentary opposition, and is the apology of much that seems violence and faction, especially in the business of the popish plot and the bill of exclusion.' The secret Treaty of Dover 'may be reckoned the first act of a drama which ended in the Revolution.'[1] The King's Declaration of Indulgence united in opposition to it not only the zealous Churchmen, who were disgusted at the favour shown to both Papists and Dissenters, but also the Dissenters themselves, whose hatred of Popery outweighed their gratification at their own toleration, as well as all lovers of Liberty and Law, who could not but regard the King's pretensions, in explicit terms, to suspend a body of statutes, and his command to magistrates not to put them in execution, as an assertion of despotic power illegal in itself, and capable of most dangerous extension. The House of Commons voted 'that penal statutes in matters ecclesiastical cannot be suspended but by Act of Parliament,' and addressed the King to recall his Declaration. In his answer the King lamented that the Commons should question his Ecclesiastical power, which had never, he said, been done before. To which they replied that they 'humbly considered that his Majesty had been very much misinformed: since no such power was ever claimed or exercised by any of his predecessors; and, if it should be admitted, might tend to the interruption of the free course of the laws, and altering of the legislative power, which had always been acknowledged to reside in the King and the two Houses of Parliament.'[2] At length the King was obliged to give way, and

[1] Hallam, Const. Hist. ii. 384.
[2] Cobbett's Parl. Hist. iv. 551.

cancelled the Declaration. But the Commons, not satisfied with this concession, extorted his assent to the Test Act, as a measure of security against Popish counsellors and officials. The Act, however, was so framed as to affect with equal disqualification nearly all classes of Protestant Dissenters. It provided that all persons holding any office or place of trust, civil or military, or admitted of the King's or the Duke of York's household, should publicly receive the sacrament according to the rites of the Church of England, and also take the oath of supremacy, and subscribe a declaration against Transubstantiation. The immediate effect of the Act was to compel Lord Clifford to resign his office of Treasurer, and the Duke of York to quit the post of Lord High Admiral.

Bill for relief of Dissenters.

In return for the support given by the Dissenters to the Test Act, a Bill was passed, after some debate, by the House of Commons, giving a considerable amount of relief to Protestant sectaries; but it was delayed in the Lords' House, who introduced several amendments, and a sudden prorogation caused it to be dropped.

Parliamentary Test Act, 1678.

Five years later, in 1678, a *Parliamentary Test* was imposed which, for the first time, excluded Roman Catholic Peers from Parliament. This was mainly due to the alarm excited in the nation by the discovery of the supposed Popish plot.[1] By the 'Act for the more effectual pre-

[1] 'It is to be remembered that there was really and truly a popish plot in being, though not that which Titus Oates and his associates pretended to reveal—not merely in the sense of Hume, who, arguing from the general spirit of proselytism in that religion, says there is a perpetual conspiracy against all governments, protestant, Mahometan, and pagan, but one alert, enterprising, effective, in direct operation against the established protestant religion in England. In this plot the king, the duke of York, and the king of France were chief conspirators; the Romish priests, and especially the Jesuits, were eager co-operators. Their machinations and their hopes, long suspected, and in a general sense known, were divulged by the seizure and publication of Coleman's letters. "We have here," he says, in one of them, "a mighty work upon our hands, no less than the conversion of three kingdoms, and by that perhaps the utter subduing of a pestilent heresy, which has a long time domineered over this northern world. There were never such hopes since the death of our Queen Mary as now in our days. God hath given us a prince who is become (I may say by miracle) zealous of being the author and instrument of so glorious a work; but the opposition we are sure to meet with is also like to be great, so that it imports us to get all the aid and assistance

serving the King's person and government, by disabling Papists from sitting in either House of Parliament' (30 Car. II. st. 2, c. 1), it was provided that no Peer, or member of the House of Commons, should sit or vote without taking the oaths of allegiance and supremacy, and a declaration repudiating the doctrine of Transubstantiation, the adoration of the Virgin, and the sacrifice of the Mass. Peers and members offending were to be deemed and judged Popish recusants convict, and forfeit £500, besides suffering numerous disabilities. While the Bill was in the Lords' House, the Duke of York moved that an exception might be admitted in his favour, and this was agreed to, but only by a majority of two.[1]

In the Declaration issued by Charles II. from Breda (14 April, 1660), he had embodied the Cromwellian principle, that no man should be called in question for differences of religious opinion not disturbing the peace of the kingdom. But the great majority of the English people were not yet prepared to concede Toleration; and by the Act of Uniformity all Dissenters from the Established Church, Protestant and Roman Catholic alike, were subjected to the bonds of a rigid conformity. The provisions of this celebrated statute (13 & 14 Car. II. c. 4) may be divided into two classes: (1) Clauses which continue in force at the present day, viz., those which legalise the Book of Common Prayer as then recently revised in Convocation, with a direction for its use in every parish church and other places of public worship; and which require Episcopal ordination of all persons holding ecclesiastical preferment, together with a declaration from all such persons of unfeigned assent and consent to the contents of the Book of

Act of Uniformity, 1662.

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we can." These letters were addressed to Father la Chaise, confessor of Louis XIV., and displayed an intimate connexion with France for the great purpose of restoring popery.'—Hallam, Const. Hist. ii. 420.

[1] From the time of Elizabeth the oath of supremacy had been exacted from members of the House of Commons but not from the Lords (*supra*, p. 466). Roman Catholic Lords were now for the first time excluded from their seats; and until the reign of George IV. (10 Geo. IV. c. 7) both Houses were effectually closed to the members of that religion.

Common Prayer. (2) Certain persecuting clauses directed against Dissenters, which have since been repealed. By the 34th section, the Uniformity Act of the 1st Eliz. c. 2 (1558-9) was re-enacted; and as this incorporates by reference penal clauses in the earlier Uniformity Act of 5 & 6 Edw. VI. c. 1 (1551-2), which again incorporates similar clauses in the Uniformity Act 2 & 3 Edw. VI. c. 1 (1548), the statute of Charles II. revived and confirmed, (*a*) the offences of 'declaring or speaking anything in the derogation, depraving or despising of the Book of Common Prayer, or of anything therein contained, or any part thereof,' and of 'willingly and wittingly hearing or being present at any other manner or form of Common Prayer than is mentioned and set forth in the Book of Common Prayer' (the punishment in each case being, for the third offence, imprisonment for life); and also (*b*) the compulsory attendance at parish churches. These provisions were not repealed till the reign of her present Majesty.[1]

The 14th sec. of the Act of Charles II. declared 'that no person should presume to administer the holy sacrament of the Lord's Supper' until he should be ordained priest by Episcopal ordination, under the penalty of £100 for such offence. This penalty was repealed in 1688 by the Toleration Act of William and Mary.[2]

By the 9th sec., not only all persons in holy orders, but all schoolmasters and persons instructing youth, were required to subscribe a declaration of non-resistance, and that they would conform to the liturgy of the Church of England as by law established. Schoolmasters and private tutors were also subjected to the penalty of three months' imprisonment if they should presume to exercise their calling without previous licence from the bishop of the diocese. That part of the declaration which related to non-resistance was abolished at the Revolution by statute 1 Will. & Mary, c. 8; but the licence of private tutors, though in later times

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[1] 7 & 8 Vict. c. 192; 9 & 10 Vict. c. 59.
[2] 1 Will. & Mary, st. 1, c. 18.

practically obsolete, was not repealed till 1846 by the 9 & 10 Vict. c. 59.[1]

The immediate result of the new Act of Uniformity was to eject from the Established Church about 2000 ministers (for the most part non-episcopally ordained), who further recruited the ranks of Protestant Nonconformists. But these were not allowed to worship among themselves in peace. By the monstrous Conventicle Act (16 Car. II. c. 4) every person above sixteen years of age present at a conventicle (defined as 'any meeting for religious worship at which five persons were present besides the household') was subjected to the penalty of three months' imprisonment for the first offence, of six for the second, and for the third to seven years' transportation. A single Justice of the Peace was empowered to convict for the first and second offences (a provision which, Burnet tells us, 'was thought a great breach on the security of the English Constitution'), but transportation for the third offence could only be awarded on conviction by a jury. Return before the expiration of the term of banishment, or escape after conviction, was made felony punishable with death.[2]

Conventicle Act, 1664.

This enactment was followed, in the next session, by 'An Act for restraining Nonconformists from inhabiting in corporations' (17 Car. II. c. 2). By this 'Five-Mile Act,' as it is usually termed, (1) a new test oath of non-resistance was imposed upon the clergy; (2) every Nonconformist minister was prohibited, under the penalty of £40 for each offence, from coming within five miles of any corporate town; or of any parish, town, or place wherein he had been parson, vicar, curate, stipendiary, or lecturer, or had taken

Five-Mile Act, 1665.

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[1] On the Uniformity, Test, and Corporation Acts, see Andrew Amos, English Constitution in the Reign of Charles II., pp. 87, 135.

[2] The Conventicle Act was limited in duration to three years, and expired in 1667. In 1670 it was renewed, with some mitigation of penalties, but with an extraordinary proviso, which reversed the established legal principle of construing penal Acts :—'That all clauses in the Act should be construed most largely and beneficially for suppressing conventicles, and for the justification and encouragement of all persons to be employed in the execution thereof.'—22 Car. II. c. 1.

upon him to preach in unlawful assembly or conventicle; and (3) all Nonconformists, whether lay or clerical, were restrained from teaching in any public or private school, under the penalty of £40 fine and six months' imprisonment.

Persecution of Nonconformists.

The provisions of these merciless statutes were not allowed to remain a dead letter. The Religious persecution was far more severe than it had ever been at any period of the Commonwealth, and more widely extended than under Charles I.[1] No less than 8000 Protestants are said to have been imprisoned during this reign, in addition to a large number of Roman Catholics. Of 1500 Quakers who were confined, 350 died in prison.[2]

Attempts at Comprehension.

In 1661 at the Savoy Conference, in 1669 under the Cabal Ministry, and again in 1674 through the exertions of Tillotson and Stillingfleet, attempts were indeed made to bring about a reconciliation between the Church and the Protestant Nonconformists; but the real difficulty of effecting a compromise, and the unyielding temper of both parties, caused every effort at comprehension to fail.

Origin of the Whig and Tory parties.

It was in the year 1679, during the intense public agitation caused by the introduction of a Bill to exclude the Duke of York from the throne, on the ground of his professed Romanism, that the now familiar names of Whig and Tory were first applied to the two great political parties in the State. The King, having dissolved Parliament on the 27th May, in order to quash the Exclusion project, numerous petitions were sent up from all parts of the country praying for the speedy meeting of a new Parliament. These were met by others from the adherents of the Court party, expressing abhorrence at the attempt to coerce the King to summon Parliament, as an encroachment on the Royal prerogative. The rival parties were termed in consequence 'Petitioners' and 'Abhorrers,' names

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[1] Hallam, Const. Hist. ii. 351.

[2] Neal, Hist. of the Puritans, v. 17; Delaune, Plea for Nonconformists; Short's Hist. 559.

which were soon afterwards changed for 'Whig' and 'Tory.'[1]

But although the Whigs and Tories were first so designated at the time of the Exclusion Bill, the germs of the two parties may be discerned in the opposition of the Puritan members of the Lower House to the upholders of the Royal prerogative under Elizabeth, and their corporate existence may be carried back at least to the schism in the Constitutional party in the Commons, which manifested itself during the debates on the Grand Remonstrance in 1641.[2]

Difference in principle between the two parties.

Both Whigs and Tories, it is to be observed, agreed in maintaining the system of government by King, Lords, and Commons, and all the ancient and fundamental institutions of the English Constitution. But there was, nevertheless, a wide and irreconcileable difference of opinion between them. The Tories looked towards the Crown, and thought that the public good was best subserved by the exaltation of the Royal prerogative; the Whigs looked towards the People, whose welfare they regarded as the end and object of all governments. 'They differed,' says Hallam, 'mainly in this: that to a tory the constitution, inasmuch as it was the constitution, was an ultimate point, beyond which he never looked, and from which he thought it altogether

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Names of Whig and Tory.

[1] *Supra*, p. 642. 'It is a curious circumstance,' observes Lord Macaulay [Hist. i. 258], 'that one of these nicknames was of Scotch, and the other of Irish, origin. Both in Scotland and in Ireland misgovernment had called into existence bands of desperate men whose ferocity was heightened by religious enthusiasm. In Scotland, some of the persecuted Covenanters, driven mad by oppression, had lately murdered the primate, had taken arms against the Government, had obtained some advantages against the King's forces, and had not been put down till Monmouth, at the head of some troops from England, had routed them at Bothwell Bridge. These zealots were most numerous among the rustics of the western lowlands, who were vulgarly called Whigs. Thus the appellation of Whig was fastened on the Presbyterian zealots of Scotland, and was transferred to those English politicians who showed a disposition to oppose the court, and to treat Protestant Nonconformists with indulgence. The bogs of Ireland, at the same time, afforded a refuge to Popish outlaws, much resembling those who were afterwards known as Whiteboys. These men were then called Tories. The name of Tory was therefore given to Englishmen, who refused to concur in excluding a Roman Catholic prince from the throne.'

[2] *Supra*, p. 611.

impossible to swerve; whereas a whig deemed all forms of government subordinate to the public good, and therefore liable to change when they should cease to promote that object. Within those bounds which he, as well as his antagonist, meant not to transgress, and rejecting all unnecessary innovation, the whig had a natural tendency to political improvement, the tory an aversion to it. The one loved to descant on liberty and the rights of mankind, the other on the mischiefs of sedition and the rights of kings. Though both, as I have said, admitted a common principle, the maintenance of the constitution, yet this made the privileges of the subject, that the Crown's prerogative, its peculiar care. Hence it seemed likely that, through passion and circumstance, the tory might aid in establishing despotism, or the whig in subverting monarchy. The former was generally hostile to the liberty of the press, and to freedom of inquiry, especially in religion; the latter their friend. The principle of the one, in short, was amelioration, of the other, conservation.'[1]

Failure of the Exclusion Bill and prostration of the Whigs.

Despotic power of Charles II. during the last years of his reign.

The failure of the Exclusion Bill and the excesses of the Opposition were followed by a violent reaction in public opinion, which laid the Whig party prostrate, and enabled Charles II. to enjoy, during the last years of his reign, that despotic power for which he had long been languidly scheming. 'It is difficult to say,' Lord Russell has remarked, 'for what reason Charles, a witty and heartless man of pleasure, embarked in the vast undertaking of making himself absolute. Perhaps his easy temper made him yield to the suggestions of his brother; perhaps he merely consented to the advice of his courtiers. The ready way of accomplishing this design, once adopted, was, as he conceived, to obtain money and troops from France. And as his father's throne had been overturned by religious fanaticism, he proposed to lay the foundation of his own upon a religion of blind obedience. The scheme not

[1] Hallam, Const. Hist. iii. 198.

running on smoothly, however, he gave it up, partly from laziness and partly from prudence, contenting himself with charitable donations from France from time to time. The virulent opposition of Shaftesbury, and the attempt to exclude his brother from the throne, again roused him to exertion; and the discovery of the Rye House plot afforded him a tolerable pretext for ridding himself of all his considerable enemies. Thus, without activity or anxiety, by merely taking advantage of events as they arose, he procured for himself an authority which those of his family who made kingcraft their occupation never possessed. He subdued the liberties of England, because it gave him less trouble than to maintain them. But still, though unsuccessful, the men who could propose and carry through the House of Commons a bill for the exclusion of the next heir to the throne evinced a spirit of honesty and freedom which no hazard could quell. The Bill of Exclusion was the legal warning of the Revolution.'[1]

JAMES II. 1685–1688. His despotic designs.

JAMES II. ascended the throne in 1685, with a fixed design to make himself an absolute monarch, and to subvert the Established Church.

Circumstances favourable to them.

In many respects circumstances appeared peculiarly favourable to his despotic aims. The Popular party were for the time completely crushed. The determination of Charles II.'s last Parliament, in 1681, to accept of nothing but the Exclusion Bill had been punished by a sudden dissolution, after a session of only one week; and in violation of the plain letter of the law, which required that no longer interval than three years should elapse between the dissolution of one Parliament and the assembling of another, no writs had since been issued for an election. The High Church and Tory party were loud in their advocacy of hereditary despotism as a divinely-ordained institution, and the University of Oxford had but recently (July, 1683) published a decree asserting the necessity of Passive Obedi-

[1] Earl Russell, Eng. Gov. and Const. p. 83.

ence, and condemning the works of Milton, Buchanan, and others, containing contrary propositions, to be publicly burnt. If it should be found necessary or expedient to summon a Parliament, steps had been taken to render that assembly as subservient to the Crown as its predecessors had been under Henry VIII. In 1683 an information *quo warranto* had been filed in the King's Bench against the Corporation of London, which, on the ground of some alleged irregularities, was adjudged to have forfeited its Charters. The Corporation was then remodelled in such a manner as to render it a mere tool of the Court. The same policy was pursued during the next five years against several other obnoxious corporations; many others were intimidated into making quasi-voluntary surrenders, receiving in return new Charters, framed on a far more oligarchical model, and reserving to the King the right of appointing the first members;[1] and the general result was to confine the power of returning a large proportion of the members of the House of Commons to nominees of the Crown. In addition, Louis XIV. of France was ready and anxious to aid the designs of his brother monarch with money and men.

The Customs illegally levied.

James began his reign by an illegal Proclamation ordering the continued payment of the Customs duties, which had been granted only for the late King's life. With much misgiving, the King yielded to the advice of his Ministers and summoned a Parliament.[2] 'Those who look,' says

A Parliament summoned.

[1] Judge Jeffreys, on the northern circuit, in 1684, is said to have 'made all the charters, like the walls of Jericho, fall down before him, and returned laden with surrenders, the spoils of towns.'—North's Examen, 626, cited in Hallam, Const. Hist. ii. 451.

[2] James 'was painfully anxious to exculpate himself from the guilt of having acted undutifully and disrespectfully towards France. He led Barillon into a private room, and there apologised for having dared to take so important a step without the previous sanction of Lewis. "Assure your master," said James, "of my gratitude and attachment. I know that without his protection I can do nothing. I know what troubles my brother brought on himself by not adhering steadily to France. I will take good care not to let the Houses meddle with foreign affairs. If I see in them any disposition to make mischief, I will send them about their business. Explain this to my good brother. I hope that he will not take it amiss that I have acted without consulting him. He has a right to be consulted; and it is my wish to consult him about every-

Hallam, 'at the debates and votes of this assembly, their large grant of a permanent revenue to the annual amount of two millions, rendering a frugal prince, in time of peace, entirely out of all dependence on his people; their timid departure from a resolution taken to address the King on the only matter for which they were really solicitous, the enforcement of the penal laws, on a suggestion of his displeasure; their bill entitled, for the preservation of his majesty's person, full of dangerous innovations in the law of treason, especially one most unconstitutional clause, that any one moving in either house of parliament to change the descent of the crown should incur the penalties of that offence; their supply of £700,000, after the suppression of Monmouth's rebellion, for the support of a standing army; will be inclined to believe that, had James been as zealous for the church of England as his father, he would have succeeded in establishing a power so nearly despotic that neither the privileges of parliament, nor much less those of private men would have stood in his way. . . . Nothing less than a motive more universally operating than the interests of civil freedom would have stayed the compliant spirit of this unworthy parliament, or rallied, for a time at least, the supporters of indefinite prerogative under a banner they abhorred.'[1] This motive was supplied by the King him- Its servile character.

thing. But in this case the delay even of a week might have produced serious consequences." . . . On the following morning . . . Rochester proceeded to ask Barillon for money. "It will be well laid out," he said; "your master cannot employ his revenues better. Represent to him strongly how important it is that the King of England should be dependent not on his own people, but on the friendship of France."'—Macaulay, Hist. i. 458. [It seems only fair to balance Macaulay's easy acceptance and ready circulation of this story to James's discredit and that of his Ministers by citing the warning contained in *Edinb. Rev.*, April, 1889, p. 308, Art. *Sidney, Earl of Godolphin*, where the Reviewer reminds us that this story 'rests on Barillon's authority.' It involves the allegation that Godolphin said to Barillon, on behalf of his colleagues, that 'he had given new life to their royal master.' The story, says the *Edinburgh* Reviewer, is 'inconsistent with what we know of Godolphin's character,' and 'though it has been related and repeated by historians till its reiteration has secured its general acceptance, it still stands on Barillon's testimony; and we are hardly justified in condemning a great English minister on such evidence.' We may even, perhaps, be hardly justified in condemning an English King on evidence which is exactly the same as that which affects his Minister.—ED.]

[1] Hallam, Const. Hist. iii. 50–52.

self, in the alarm for the Reformed Church inspired by his manifest determination to gradually fill all places of trust, civil and military, with professors of the Roman Catholic religion.

Its opposition to the King's design to overthrow the Test Act punished by prorogation and ultimate dissolution.

The opposition shown by the Parliament to the King's avowed intention of keeping Romish officers in his service, contrary to the provisions of the Test Act, was punished by a hasty prorogation; and although Parliament was continued in existence by further prorogations for about eighteen months before being dissolved, it was never again assembled during James's reign.

Increase of the standing army.

Taking advantage of Monmouth's late insurrection, the King increased the number of regular troops in England from 6000 to about 30,000;[1] and as these were largely

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Standing Army. Two kinds of troops, constitutional and non-constitutional. (i.) *Constitutional:* (a.) *Feudal militia.* (b.) *Allodial militia.* (ii.) *Non-Constitutional:* (a.) *Royal body-guard. Garrisons.* (b.) *Stipendiary troops. Conscripts.*

[1] STANDING ARMY.—The military force in England had long consisted of two kinds of troops, which may be classified as Constitutional and Non-Constitutional.

(1) The Constitutional forces, consisting of (*a*) the feudal militia, bound by the tenure of their lands to serve the King both at home and abroad (summoned for the last time to render personal service in the expedition of Charles I. against the Scots in 1640, and extinguished by the Act 12 Car. II. c. 24, abolishing the military tenures), and (*b*) the allodial or national militia, bound exclusively to service at home, and already sufficiently described (*supra*, pp. 63, 97, 195–8).

(2) The Non-constitutional forces were also of two kinds: (*a*) those of a more or less permanent character, such as the small *body guard* of the sovereign (*supra*, p. 381, *n.* 1) and the *garrisons*, insignificant in number, maintained in a few fortified places—the Tower of London, Portsmouth, Dover, Tilbury, and, before the union of the crowns, Berwick and some other places on the Scottish border: (*b*) those raised for special emergencies, comprising the *stipendiary troops*, which even in feudal times were regularly employed by English kings for the purposes of foreign warfare, and the levies raised by *compulsory conscription*. Edward I. and Edward II. on several occasions had recourse to compulsory conscription. But this was clearly illegal; and accordingly the first Parliament of Edward III. passed a statute (1 Edw. III. c. 5), 'That no man from henceforth should be charged to arm himself otherwise than he was wont in the time of the king's progenitors; and that no man be compelled to go out of his shire but when necessity requireth and sudden coming of strange enemies into the realm; and then it shall be done as hath been used in times past for the defence of the realm.' This statute Edward endeavoured to evade by calling, not on individuals, but on the counties and chief towns to furnish him with troops. The Parliament met this new demand by a statute (25 Edw. III. c. 8) providing 'that no man shall be constrained to find men-at-arms, hobblers, nor archers, other than those who hold by such service, if it be not by common consent and grant in Parliament.' Both these statutes were confirmed in the fourth year of Henry IV. (c. 13). For some time compulsory levies for foreign warfare were discontinued, and a system of contracting with men of rank and influence to raise troops at a high rate of pay was adopted. But as the great cost of stipendiary troops caused our Kings to disband them as

Statutes against compulsory levies.

Troops raised by contract.

officered by Roman Catholics, he trusted that he had rendered himself independent of all forcible opposition.

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soon as the particular necessity for which they were engaged had ceased, the country escaped the danger of a standing army.

Revival of compulsion under the Tudors.

Under the despotic sway of the Tudors the prerogative of pressing men for military service out of the kingdom was to some extent revived. Its exercise by Charles I. called forth, as we have seen, the declaratory statute against impressment of the 16th year of his reign (*supra*, p. 609). The great object of Charles and of Strafford was to obtain a standing army; but the Popular party in Parliament, aware that the free states of the Continent had been turned into despotisms through this very means, offered a determined opposition. The outbreak of the Civil War ultimately turned upon the question who should command the military forces; and it was in the Civil War that the system of standing armies in this country originated. By the 'Instrument of Government,' in 1653, which invested Cromwell with the title of 'His Highness the Lord Protector,' provision was made for the support of a regular army of 30,000 men; and the military subjection in which Cromwell held the country excited amongst all parties a deep-rooted antipathy to a standing army. At the Restoration the people clamoured for the disbandment of the army of the Commonwealth, to which Charles II. somewhat reluctantly assented. General Monk's Foot regiment (the Coldstream) and one other of Horse were, however, retained in the King's service; another was formed out of troops brought from Dunkirk; and these, amounting in 1662 to 5000 men, formed, under the name of Guards, the nucleus of the present Regular Army.

Act of 16 Car. I. against it.

Origin of Standing Army during the Civil War.

Disbanded at the Restoration.

Growth of Standing Army under Charles II. and James II.

Towards the end of Charles II.'s reign, in 168[4], the garrison of Tangier (consisting of one regiment of Horse and two of Foot) was recalled to England, and raised the numbers of the regular force to about 7000 foot and 1700 cavalry and dragoons. James II. endeavoured to make himself absolute by means of a great standing army. Taking advantage of Monmouth's insurrection, he made large additions to the military force left by his brother, and brought up their numbers to about 30,000 men. He formed a vast camp at Hounslow for the purpose of overawing London, and induced the Judges to pronounce sentence of death on deserters, contrary to both the letter and spirit of the law. But under both Charles II. and James II. the Parliament took every opportunity of opposing the permanent retention of the troops which were necessarily raised from time to time for special purposes. When, in 1667, 12,000 fresh troops were hastily levied for the Dutch war, the Commons at once came to an unanimous resolution to request the King to disband them immediately upon the conclusion of peace. Similarly, in 1673, after fresh levies had been raised for the second Dutch war, the Commons resolved 'that the continuing of any standing forces in this nation, other than the militia, is a great grievance and vexation to the people;' and when, in 1678, Charles II. suddenly levied 20,000 men, on the pretext of a war with France, the Commons only consented to vote supplies on condition that these troops should be disbanded. One of the principal articles of Clarendon's impeachment was that he had advised 'the raising of a standing army and to govern the kingdom thereby' (*supra*, p. 545, *n.*)

Parliamentary opposition to it.

Declared illegal by Bill of Rights.

The Mutiny Act.

The illegality of raising or keeping a standing army within the kingdom in time of peace, except with consent of Parliament, is expressly declared by the Bill of Rights. This declaration has been regularly repeated in the Mutiny Act (passed for the first time in 1688, for one year only, and annually renewed ever since), together with the further declaration 'that no man can be forejudged of life and limb, or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by judgment of his peers and according to the known and established laws of this realm.' Then follow provisions for embodying an army for the safety of the Kingdom and its dependencies, and authorising the Sovereign to make articles of war for the government of the troops by martial law.

The King throws off all disguise.

Throwing off all disguise, he soon made it apparent that, with a bench of Judges to pronounce his commands, and

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Continued prejudice against a Standing Army after the Revolution.

Although the maintenance of a military force has been absolutely dependent, since the Revolution, upon the will of Parliament, so strong was the national prejudice under William III. against a standing army, that in 1697, after the Peace of Ryswick, the Commons insisted upon the dismissal of the King's Dutch guards and on the reduction of the number of troops to 7000 (afterwards increased to 10,000) for the defence of England, and 12,000 for Ireland. The great victories of Marlborough reconciled the nation somewhat to the idea of a standing army; and it was, moreover, necessary during the life of the Pretender, in order to prevent the Scotch and other adherents of the exiled Stuarts from rising in rebellion; yet, under George I. and down to the close of the eighteenth century, the ordinary peace establishment, exclusive of the troops in Ireland, but including the garrisons of Minorca and Gibraltar, only slightly exceeded 17,000 men. In 1731, Parliament manifested its jealousy of the military power by passing an Act (8 Geo. II. c. 30) forbidding any troops to come within two miles of any place, except the capital or a garrison town, during an election. In the same spirit, the Commons resolved, in 1741, consequent upon the military having been called in to quell some riotous proceedings at a Westminster election, 'that the presence of a regular body of armed soldiers at an election of members to serve in Parliament is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom;' and the persons concerned in the matter were ordered to attend the House, and received on their knees a severe reprimand from the Speaker.

The Nation reconciled to a Standing Army after the Peninsular War.

The French Revolution and the Peninsular War not only finally reconciled the nation to a standing army, but excited a desire in many—the country gentlemen especially—for a very large permanent force. In proposing for the peace establishment of the United Kingdom, in 1816, an army of 50,000 men (in addition to 100,000 to be distributed among the colonies, reliefs, France, and India), the Ministers of the Crown said 'it was rendered necessary, first on account of the increase of the military establishments of continental states, and the necessity of preserving our station among the Powers of Europe; and, secondly, because of the increase of population, and the military services required in collecting the revenue and executing the laws.'

Earl Russell's remarks on a standing army.

'These reasons,' observes Earl Russell (Eng. Const. 281), 'may serve as a guide to teach the people of England for what purposes an army ought *not* to be kept up. They afford a limit and a rule for the amount of our military force. As long as the numbers of the army can be proved to be indispensable for maintaining garrisons in fortified places and preserving a nucleus for war, the nation may consider general harangues against a standing army as puerile declamation; but when they hear it urged that it is necessary to assimilate our peace establishment to that of the Continental Powers, and that a large army is rendered necessary by the increase of our population, then it is time for them to rouse themselves and shake off, before it is too late, the burthen of a military government.' The vast scale upon which warfare has been conducted in recent years, has, of course, rendered it necessary that the 'nucleus,' even for purely defensive purposes, should be much larger than formerly.—Cf. Earl Russell, Eng. Const. 269–281; Hallam, Middle Ages, i. 263, iii. 45, 46, Const. Hist. iii. 104–106, 256–260; Macaulay, Hist. Eng. (Works, ed. 1866), i. 94–97, 227–233, 525, 526, iv. 331–349. [It may be noted in connection with the state of public feeling on this subject after the Peace of Ryswick, that Defoe's 'first conspicuous literary service to King William, after he obtained government employment,' was a pamphlet entitled *Argument showing that a Standing Army, with consent of Parliament, is not inconsistent with a Free Government.*

an army to enforce them, Constitutional limitations would no longer be suffered to stand in the way of his despotic designs.[1]

The Dispensing Power.

His first step was to procure a Judicial decision in favour of his assumed prerogative of dispensing with the observance of the laws.[2] Having carefully eliminated from the Bench such of the Judges as would not promise to decide according to his wishes,[3] and having appointed others in their stead, a collusive action was brought against Sir Edward Hales, a recent convert to Romanism, for the penalty of £500 incurred by accepting a military command without taking the oath and making the subscription required by the Test Act. The defendant having pleaded, in answer to the Act, a dispensation from the Crown, eleven out of the twelve Judges decided in favour of the prerogative; grounding their decision upon slavish maxims of absolute power which were capable of extension far beyond the immediate case.[4]

Hales' case, 1686.

The Dispensing Power, which the Courts of law had thus solemnly recognised, was now vigorously and systematically exercised. Four Roman Catholic peers, Powis, Belasyse, Arundell, and [Jermyn of] Dover,[5] with Father Petre,

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'Though coming late in the day, Defoe's pamphlet was widely read, and must have helped to consolidate the victory.' Minto's *Defoe*, pp. 14, 15.—ED.]

[1] Hallam, Const. Hist. iii. p. 59.

[2] On the Dispensing and Suspending powers, see *supra*, p. 329.

[3] 'I am determined,' said the King to Chief Justice Jones, of the Common Pleas, 'to have twelve judges who will be all of my mind as to this matter.' 'Your Majesty,' answered the Chief Justice, 'may find twelve Judges of your mind, but hardly twelve lawyers.' He was then plainly told that he must either give up his opinion or his place. 'For my place,' he answered, 'I care little. I am old and worn out in the service of the Crown; but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give.' He was dismissed, together with Montague, Chief Baron of the Exchequer, and two puisne judges, Neville and Charlton.—Macaulay, Hist. [ii. 81].

[4] *Godden* v. *Hales*, 2 Shower, Rep. 475; 11 State Trials, 1165; cf. Hallam, Const. Hist. iii. 61 [, and Denman's Broom's *Const. Law*, pp. 501–3, in Note to Case of the Seven Bishops.—ED.]

[5] [Some brief account of these Peers may not be without interest here. Lord Powis was William Herbert, 3rd Lord, grandson of Sir William Herbert, K.B., cr. Lord Powis, 1629, Earl of Powis, 1674, and Marquis of Powis, 1687. He accompanied James to France, was there created Duke of Powis, and died at St. Germains, 1696. The outlawry of the 1st Marquis having been reversed,

a Jesuit, were sworn of the Privy Council. Several clergymen who had seceded to Romanism were authorised to hold benefices without complying with the requirements of the Act of Uniformity; the Vice-Chancellor of [the University of] Cambridge was deprived of his office for declining to confer, at the King's request, an academical degree upon Alban Francis, a Benedictine monk; and the Fellows of Magdalen College, Oxford, were expelled for refusing to elect as their President a Roman Catholic nominee of the Crown. These last two acts of tyranny were accomplished under the summary and arbitrary jurisdiction of a new 'Court of Commissioners for Ecclesiastical Causes,' which the King had recently established in direct defiance of the Act of the Long Parliament (16 Car. I. c. 11) abolishing

Deprivation of the Vice-Chancellor of Cambridge.

Expulsion of the Fellows of Magdalen College, Oxford.

New High Commission Court.

1722, the English titles descended to the 3rd Marquis, who died *circa* 1748. By a new creation, an Earldom of Powis is now vested in the heirs of the niece of the last Marquis, who married the nearest heir male. Lord Belasyse was John, second son of Thomas, 1st Viscount Fauconberg, created Lord Belasyse of Worlaby, 1644, who held high commands on the King's side in the Civil War, and after the Restoration. He was First Lord of the Treasury, *t.* Jac. II., on the dismissal of Rochester, and died 1689. The title became extinct on the death, *s.p.*, of his grandson the 2nd Lord, 1692. Lord Arundell of Wardour was the representative of the younger branch of an ancient Cornish stock, the Arundells of Lanherne, seated at Wardour Castle, Wiltshire, from Tudor times. Henry, 3rd Lord, grandson of Thomas, 1st Lord Arundell of Wardour, created 1605, was imprisoned, 1678, on the information of Titus Oates. On his release, 1685, he was sworn of the Privy Council, as stated in the text, and, in 1686, was made Lord Keeper of the Privy Seal, and K.B. On the abdication of James, he retired to Wiltshire, and died 1694. Sir Thomas, the first Lord Arundell of Wardour, was created a Count of the Holy Roman Empire, 1595, by the Emperor Rodolph II. Lord Dover, strictly speaking Lord Jermyn of Dover, created 1685, was Henry, next younger brother of Thomas, 2nd Lord Jermyn of St. Edmundsbury, and nephew of Henry, 1st Lord Jermyn of St. Edmundsbury, created 1643, who was created Earl of St. Alban's at Breda, immediately upon the Restoration, 27th April, 1660, and was soon after made K.G., and Lord Chamberlain of the Household. Lord Jermyn of Dover, who was, with Sir Stephen Fox, John, Lord Belasyse, Lord Godolphin, and Sir John Ernle, one of the Commissioners of the Treasury, appointed on the dismissal of the Earl of Rochester, in January, 1686–7, died *s.p.*, 1708. Cf. Burke's *Peerage*, and *Dormant and Extinct Peerages*. Collins, *Peerage*, ed. by Brydges, viii. 262, *s.v.* Gage, erroneously speaks of Henry Jermyn as *Earl* of Dover (thereby confusing his title with that of the Careys, Lords Hunsdon, whose Earldom of Dover, created 1627, became extinct on the death, *s.p.*, of John, 2nd Earl, 5th Lord Hunsdon, in 1677), and makes his nieces and co-heirs his sisters, and, iv. 534, *s.v.* Ilchester, calls him Henry, Lord Dover, a misleadingly brief description which may have been the source of the form under which it appeared in the original text of this work, but which is here corrected to avoid confusion with the several other Peerages which have at various times existed under the title of Dover.—ED.]

the High Commission Court, and of the more recent statute, 13 Car. II. c. 12, which, while reinstating the clergy in the Ecclesiastical power, had expressly forbidden the creation by commission of any similar Court.[1]

Declaration for Liberty of Conscience.

In April, 1687, James published his famous Declaration for Liberty of Conscience, declaring it to be his 'royal will and pleasure that from henceforth the execution of all and all manner of penal laws, in matters ecclesiastical, for not coming to church, or not receiving the sacrament, or for any other non-conformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and the further execution of the said penal laws, and every of them, is hereby suspended.'[2]

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[1] The whole government of the Church was entrusted to seven Commissioners (three clerics and four laymen), of whom the Chancellor Jeffreys was the chief. 'The words in which the jurisdiction of these officers was described were loose, and might be stretched to almost any extent. All colleges and grammar schools, even those which had been founded by the liberality of private benefactors, were placed under the authority of the new board. All who depended for bread on situations in the Church or in academical institutions, from the Primate down to the youngest curate, from the Vice-Chancellors of Oxford and Cambridge down to the humblest pedagogue who taught Corderius, were subjected to this despotic tribunal. If any one of those many thousands was suspected of doing or saying anything distasteful to the government, the Commissioners might cite him before them. In their mode of dealing with him they were fettered by no rule. They were themselves at once prosecutors and judges. The accused party was to be furnished with no copy of the charge. He was to be examined and cross-examined. If his answers did not give satisfaction, he was liable to be suspended from his office, to be ejected from it, to be pronounced incapable of holding any preferment in future. If he were contumacious, he might be excommunicated, or, in other words, be deprived of all civil rights and imprisoned for life. He might also, at the discretion of the court, be loaded with all the costs of the proceeding by which he had been reduced to beggary. No appeal was given. The Commissioners were directed to execute their office notwithstanding any law which might be, or might seem to be, inconsistent with these regulations. Lastly, lest any person should doubt that it was intended to revive that terrible court from which the Long Parliament had freed the nation, the new Visitors were directed to use a seal bearing exactly the same device and the same superscription with the seal of the old High Commission.'—Macaulay, Hist. [ii. 92].

[2] [Some Corporations appear to have fallen into the trap set by this Declaration, and to have sent up congratulatory addresses to the King on its publication. Such was the case with Woodstock, as is related by the Rev. Edward Marshall, M.A., in his *Early History of Woodstock Manor*, p. 245. But the good people of Woodstock only committed themselves, as His Majesty's 'most obedient and loyal subjects of the Church of England,' to a thankful acknowledgment of a 'gracious Declaration' wherein the King was "pleased to

Its motive.

The King's manifest object in issuing this Declaration was to obtain the support of the Protestant Nonconformists in his attempt to achieve despotic power; for the Roman Catholics had practically enjoyed religious toleration and freedom from Civil disabilities from the date of James's accession to the throne. The Nonconformists, however, for the most part mistrusted the insidious advances of the King, and against their own immediate interests, joined the Church in resisting a measure which they well knew had for its ultimate object the restoration of Romanism. It is to be observed that the Declaration went much further than the prerogative recognised in Hales' case, of dispensing with prohibitory statutes in the case of particular individuals, sweeping away, as it did in effect, a whole series of laws made for the security of the Established Church. It amounted, in the words of Mr. Justice Powell, 'to an abrogation and utter repeal of all the laws; for I can see no difference, nor know any, in law, between the King's power to dispense with laws ecclesiastical and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no Parliament. All the legislature will be in the King [, which is a thing worth considering].'[1]

It is generally resisted by the Nonconformists.

Second Declaration of Indulgence.

After a year's interval, during which the King had made rapid and open advances towards the establishment of Romanism, the Declaration of Indulgence was published a second time, followed by an Order in Council directing it to be read in all churches, and for that purpose to be sent and distributed throughout their several dioceses by the Bishops. A humble petition of the Primate and six other prelates[2] against this order, presented to the King in his

Ordered to be read in all churches.

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promise to protect and maintain the said Church and all the members thereof, 'in the free exercise of their religion as by law established, and to maintain all their rights, liberties and properties.'" This was not exactly what was in the King's mind, and there may have been a slight element of irony in these addresses.—ED.]

[1] Judgment of Mr. Justice Powell in the 'Case of the Seven Bishops,' 12 State Trials, 183 [, and Denman's Broom's *Const. Law*, p. 488.—ED.]

[2] Their names were Sancroft, Archbishop of Canterbury; Lloyd, Bishop of St. Asaph; Ken, of Bath and Wells; Trelawny, of Bristol; Lake, of Chichester; Turner, of Ely; and White, of Peterborough.

own closet, was pronounced a seditious libel; and the Seven Bishops were sent to the Tower, and soon afterwards brought to trial before the Court of King's Bench. Amidst the enthusiastic rejoicings of the whole nation, the Jury returned a verdict of acquittal (30 June, 1688).[1] 'The prosecution of the bishops,' remarks Macaulay, 'is an event which stands by itself in our history. It was the first and last occasion on which two feelings of tremendous potency, two feelings which have generally been opposed to each other, and either of which, when strongly excited, has sufficed to convulse the state—were united in perfect harmony. Those feelings were, love of the Church and love of freedom. During many generations every violent outbreak of High Church feeling, with one exception, has been unfavourable to civil liberty; every violent outbreak of zeal for liberty, with one exception, has been unfavourable to the authority and influence of the prelacy and the priesthood. In 1688 the cause of the hierarchy was for a moment that of the popular party. More than nine thousand clergymen, with the Primate and his most respectable suffragans at their head, offered themselves to endure bonds and the spoiling of their goods for the great fundamental principle of our free constitution. The effect was a coalition which included the most zealous Cavaliers, the most zealous republicans, and all the intermediate sections of the community. The spirit which had supported Hampden in the preceding generation, the spirit which, in the succeeding generation, supported Sacheverell,[2] combined to support the Archbishop, who was Hampden and Sacheverell in one. . . . The names of Whig and Tory were for a moment forgotten. The old Exclusionist took the old Abhorrer by the hand. Episcopalians, Presbyterians,

Imprisonment and Prosecution of the Seven Bishops.

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[1] [Medals were struck bearing the portrait of Sancroft, and a representation of the Church on a rock, with the legend [*Patri*]*ota triumphans*, a specimen of which was lately seen by the present Editor in a private collection. The legend was imperfect, owing to the worn state of the medal, and the letters wanting are here supplied in brackets.—ED.]

[2] *Supra*, p. 548.

Independents, Baptists, forgot their long feud, and remembered only their common Protestantism and their common danger.'[1]

Invitation to the Prince of Orange.

On the day on which the verdict of Not Guilty was returned in the case of the Seven Bishops, the celebrated invitation, signed by the Earls of Danby, Devonshire, and Shrewsbury, Lord Lumley, Compton, Bishop of London, Admiral Edward Russell, and Henry Sydney,[2] was despatched to William, Prince of Orange, and Stadtholder of the United Provinces. James now endeavoured to retrace his steps, but it was too late to regain the confidence of his people. Louis XIV. bestirred himself to assist his Royal brother. He gave notice to the States-General that he was strictly bound in friendship and alliance with his Britannic Majesty, and that any attack on England would be considered as a declaration of war against France. But James, who appeared bent on his own ruin, formally disowned the existence of any such alliance between France and England; and Louis, in disgust, withdrew his troops

James endeavours to retrace his steps.

Efforts of Louis XIV. in his behalf.

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[1] Macaulay, Hist. [ii. 391–3].

[2] [Some account of the less widely known signataries of this historic document may not be out of place. Lord Lumley, who had held a command at Sedgmoor, was Richard, 2nd Viscount Lumley of Waterford in the Peerage of Ireland, created 1628, who was created Lord Lumley, 1681, Viscount Lumley, 1689, and Earl of Scarborough, 1690, all in the Peerage of England. He died 1721. Cf. Burke, *Peerage, s. v.* Scarborough. The Lumleys are an old and powerful North country stock. Admiral Russell was 2nd son of Hon. Edward Russell, and grandson of Francis, 2nd Lord Russell of Thornhaugh, created 1603, who succeeded his cousin, the 3rd Earl of Bedford, as 4th Earl, 1627. He was Bedchamber-man to James II. when Duke of York, but retired from Court, says Burnet, on Lord Russell's death. He was one of the most eminent naval commanders of his day, and won the celebrated victory off Cape La Hogue, 1692. As a Minister he was one of the celebrated 'Junto.' In 1697 he was created Earl of Orford, but died *s.p.*, 1727. Cf. Burke, *Peerage, s.v.* Bedford, and *Dormant and Extinct Peerages, s.v.* Russell, Earl of Orford. Henry Sydney, a younger brother of Algernon Sydney, was 4th son of Robert, 2nd Earl of Leicester, K.B., and grandson of Sir Robert Sydney, created Earl of Leicester, 1618, and having zealously supported the Revolution, was created, 1689, Viscount and Baron Sydney, and, 1694, Earl of Romney, but died, *s.p.*, 1704. Cf. Burke, *Dormant and Extinct Peerages, s.zv.* Of the signataries generally it is noted by Green, *Hist. Eng. People*, iv. 26, that two, the Earl of Shrewsbury and Lord Lumley, were recent converts from the Church of Rome. Green also notes, *loc. cit.*, that Danby answered for the 'Tories,' Compton 'for the High Churchmen, goaded at last into rebellion by the Declaration of Indulgence,' Devonshire, 'the Lord Cavendish of the Exclusion struggle,' for the Nonconformists as well as for the 'general body of the Whigs.'—ED.]

from the Netherlands and poured them into Germany, thus removing from before William one of his greatest obstacles.

On the 5th November, 1688, William landed at Torbay, in Devonshire. It is unnecessary to enter at length into the details of a Revolution which the eloquent pages of Macaulay have rendered so generally familiar.

Landing of the Prince of Orange.

After the second flight of James (23rd December),[1] an assembly composed of the Lords spiritual and temporal then in London (about 70 in number) and of all persons who had been members of the House of Commons in the reign of Charles II., together with the Lord Mayor, Aldermen, and fifty of the Common Council of London, requested the Prince of Orange to assume the provisional government of the country, and to summon all the constituent bodies of the Kingdom to send up representatives to Westminster, to a Convention Parliament for the settlement of the affairs of the nation.

Flight of James.

William is requested to assume the provisional government.

The Convention Parliament met on the 22nd January, 1688-9. The nation was at this time divided into six parties, of which two—the blind enthusiasts for James II. who wished to recall him without stipulations, and the Ultra-Republicans, who wished to set up a Commonwealth—were too small and insignificant to exercise any appreciable influence. The bulk of the nation and of the Convention was divided among the remaining four parties, three being Tories of varying shades, and the fourth and largest the Whig party. Of the Tories, (1) Sherlock's party, which was especially strong among the clergy, wished that a negotiation should be opened with James for his restora-

The Convention Parliament.

Parties in the nation.

[1] [Mme. de Sévigné has some interesting passages on James's flight and William's accession. As to the king's flight, she says "il paraît que le prince (d'Orange) l'a bien voulue." As to William, on his first arrival, "il est dans Londres à la place du roi, sans en prendre le nom, ne voulant que rétablir une religion qu'il croit bonne, et maintenir les lois du pays, sans qu'il en coûte une goutte de sang." To this description of William, she adds, characteristically, "Voilà l'envers tout juste de ce que nous pensons de lui; ce sont des points de vue bien différents." *Lettres Choisies*, ed. by C. Fallet. Rouen, 1856, p. 193.—Ed.]

tion on such conditions as might fully secure the Civil and Ecclesiastical Constitution of the realm. (2) Sancroft's party maintained that the King's stupidity, perverseness, and superstition, entitled the nation to treat him as though he were insane: they wished, therefore, to hand over the administration of the kingdom to a Regent named by the Estates of the Realm, while continuing the title of James as nominal King. (3) Danby's party held that the King, by his flight, had abdicated his power and dignity:—But that, as the throne of England could not be vacant for one moment, the Crown had legally devolved on the next heir, who was the Princess of Orange. For as to James's infant son, his birth, they said, had been attended by such suspicious circumstances that it was impossible to admit his claim without enquiry;[1] and as those who called themselves his parents had removed him to France, together with all those French and Italian women of the bedchamber who, if there had been foul play, must have been privy to it, enquiry had been rendered impossible. It only remained, then, to proclaim the Princess of Orange, who was actually Queen-Regent. (4) The Whigs maintained that James, having by the gross abuse of his power, broken the mutual contract between King and People—expressed on one side by the coronation oath and on the other by the oath of allegiance—had forfeited the Crown; that the throne was therefore vacant; and that it was the right of the Nation to elect a new King, and to impose upon him such conditions as might ensure the country against misgovernment.

In the Upper House the Tories, who for the most part favoured the scheme of a Regency, were in a majority: in the Commons the Whigs greatly predominated.

Resolutions of the Commons:

On the 28th January the Commons passed their cele-

[1] The legitimacy of James II.'s son is now fully admitted by historians, but it was fiercely disputed at the time. [It is impossible at this date to see any other origin for this dispute than the violence of party feeling, and the practical doubts which might well exist regarding the possibility of a Regency in the name of the infant Prince of Wales.—ED.]

brated Resolutions: (1) 'That King James II. having endeavoured to subvert the constitution of the kingdom by breaking the original contract between King and People, and having, by the advice of Jesuits and other wicked persons, violated the fundamental laws, and withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant.' (2) 'That it hath been found by experience inconsistent with the safety and welfare of this Protestant kingdom to be governed by a Popish prince.'

(i.) That James II. had abdicated the government, and that the throne was thereby vacant.

(ii.) That government by a Popish prince was inconsistent with the safety of the kingdom.

Opposition.

To the second resolution, though obviously irreconcileable with the doctrine of indefeasible hereditary right, the Lords at once gave their unanimous assent; but the first, which was debated clause by clause, encountered much opposition in the Upper House. The first division took place on the question whether or not there should be a Regency; and a Regency was negatived by fifty-one votes against forty-nine. The Lords then voted, by fifty-three to forty-six, that there was an Original Contract between the King and the People. They agreed, without a dissentient voice, to the Commons' statement as to the mis-government of James, but substituted the word 'deserted' for 'abdicated,' and rejected the final and most important clause 'that the throne was thereby vacant,' by a majority of fifty-five to forty-one.

William announces his intentions.

William had shown his wisdom and tact by leaving the Nation to settle itself. But a crisis had now arrived when it became necessary for him to explain his views. Sending for Halifax, Danby, Shrewsbury, and some other political leaders of note, he disclaimed any right or wish to dictate to the Convention, but gave them clearly to understand that he would not accept the position of Regent, nor yet that of King Consort with only such a share in the administration as his wife, as Queen, might be pleased to allow him. If the Estates offered him the Crown for life, he would accept it; if not, he would return to his native country. It was only reasonable, he added, that the Lady Anne and her descendants should be preferred in the

succession to any children whom he might have by any other wife than the Lady Mary.[1]

The Lords withdraw their opposition; and vote that William and Mary shall be declared King and Queen.

After a pre-conference between the two Houses, in which the questions between them were fully argued on both sides, the Lords at length gave way. They resolved not to insist on their amendment to the original vote of the Commons; and proposed and carried, without a division, that the Prince and Princess of Orange should be declared King and Queen of England.

The Commons suggest conditions.

It was still to be decided upon what conditions William and Mary should be made King and Queen. A Committee of the Commons appointed to consider what steps it might be advisable to take in order to secure Law and Liberty against the aggressions of future sovereigns, reported (1) that the great principles of the Constitution which had been violated by the dethroned King should be solemnly asserted, and (2) that a long and varied list of new laws which they enumerated should be enacted in restraint of the prerogative and for the purer administration of justice. It was proposed that the Militia should be re-modelled; that the duration of Parliaments should be limited, and the Royal prerogative of prorogation and dissolution restricted; that the Royal pardon should not be pleadable to a Parliamentary impeachment; that toleration should be granted to Protestant dissenters; that the crime of treason should be more precisely defined, and State trials be conducted in a manner more favourable to innocence; that the Judges should hold their offices for life; that Juries should be nominated in such a way as to exclude partiality and corruption; with many other salutary reforms, a remarkable omission, however, being the absence of any provision in favour of the liberty of the press. In a debate on the report it was urged that legislation on so many and important subjects would delay the settlement of the nation. The list of reforms was too long, if it referred only to what ought to be accomplished before the throne was filled;

[1] Macaulay, Hist. ii. [650].

too short, if intended to include all reforms which the legislature would do well to make in proper season. It was finally decided to postpone all reforms until after the settlement of the government on its ancient Constitutional basis had been accomplished, but to set forth in the instrument by which the Prince and Princess of Orange were called to the throne, and the order of succession settled, a distinct and solemn assertion of the fundamental principles of the Constitution and of the ancient franchises of the English nation; so that the right of the King to his crown and of the People to their liberties might rest upon one and the same title-deed. The Declaration of Right was accordingly drawn up. It contains: (1) a recital of all the illegal and arbitrary acts committed by James II.; of his abdication, and of the consequent vacancy of the throne; (2) an emphatic assertion, nearly following the words of the previous recital, that all such enumerated acts are illegal; and (3) a resolution that the Crown should be settled on William and Mary for their joint and separate lives, but with the administration of the government, during their joint lives, in William alone; and after the decease of the survivor, on the descendants of Mary, then on Anne and her issue, and lastly on the issue of William. On the 13th of February, 1688–9, a tender of the Crown, on the conditions set forth in the Declaration, was made by the Marquis of Halifax in the name of all the Estates of the Realm.[1]

Postponement of reforms.

Declaration of Right.

Tender and acceptance of the Crown.

[1] The Scottish Estates, which met a month later, passed Resolutions framed, as far as possible, in conformity with those recently passed at Westminster. There was, however, one important deviation from the original. The English Convention, by voting a constructive abdication of the throne, had, while actually deposing a bad King, endeavoured to evade the question whether subjects may lawfully perform such an act. The Scottish Convention did not shrink from using the bolder word 'forfeited.' They resolved 'That James VII., being a professed Papist, did assume the royal power and acted as king, without ever taking the oath required by law, and had, by the advice of evil and wicked counsellors, invaded the fundamental constitution of the kingdom, and altered it from a legal limited monarchy to an arbitrary despotic power, and hath exerted the same to the subversion of the Protestant religion and the violation of the laws and liberties of the kingdom, whereby he hath *forfaulted* [forfeited] his right to the crown, and the throne has become vacant.' They also voted Papists incapable of wearing the crown, abolished episcopacy, made a claim of rights, and bestowed the crown on William and Mary, to descend afterwards in conformity with the limitations already marked out by the English

The Scottish Convention.

'We thankfully accept,' replied William, speaking for himself and his wife, 'what you have offered us.'

Salutary consequences of the Revolution.

Thus was accomplished the 'Glorious Revolution' of 1688, of all revolutions the least violent and the most beneficent. 'It finally decided,' says Macaulay, 'the great question whether the popular element which had, ever since the age of Fitzwalter and De Montfort, been found in the English polity, should be destroyed by the monarchical element, or should be suffered to develop itself freely, and to become dominant. The strife between the two principles had been long, fierce, and doubtful. It had lasted through four reigns. It had produced seditions, impeachments, rebellions, battles, sieges, proscriptions, judicial massacres. Sometimes liberty, sometimes royalty, had seemed to be on the point of perishing. During many years one half of the energy of England had been employed in counteracting the other half. The executive power and the legislative power had so effectually impeded each other that the state had been of no account in Europe. The King-at-Arms who proclaimed William and Mary before Whitehall Gate, did in truth announce that this great struggle was over; that there was entire union between the throne and the Parlia-

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Convention. (Macaulay, Hist. iii. [286]; Hallam, Const. Hist. iii. 328.)—The greater boldness of the Scots was in accordance with their well-known character for turbulence and independence. 'There have been more rebellions in Scotland,' Buckle remarks (Hist. of Civilisation, ii. 159) 'than in any other country, and the rebellions have been very sanguinary as well as very numerous. The Scotch have made war upon most of their kings, and put to death many.' The loyalty of the Highlander was directed towards the chief of his clan, and the Lowlander was no less opposed to the doctrine of passive obedience to the King. Mr. Lecky (Hist. of England in the Eighteenth Century, ii. 42, citing Burnet's Speech on the Sacheverell Case, 1710) mentions the significant fact that during the minority of James [VI.] of Scotland, 'the well-known saying of Trajan when he delivered the sword to the governor of a province, "*Pro me; si merear in me*," was actually inscribed on the coin of the realm, and although the King afterwards changed the motto, the coin was not called in, and continued to circulate till the Union.' [This legend was inscribed on the Sword dollar, or silver 30*s.* piece of James VI., as struck from 1567 to 1571. Lindsay, *View of the Coinage of Scotland.* Cork, 1845. P. 107, No. 525, *seq.* Lindsay reads '*mereor*,' and describes the Reverse of the first issue bearing the legend as 'a sword erect crowned, between a hand at one side pointing to the value at the other, and the date 1567.' Mr. Lecky's use in his text, at the place here cited, of the erroneous designation 'James I.' when describing a Scottish coin of James VI., minted, moreover, long before his accession to the English Crown, misled the author in his second edition of this work.—ED.]

ment; and that England, long dependent and degraded, was again a power of the first rank; that the ancient laws by which the prerogative was bounded would thenceforth be held as sacred as the prerogative itself, and would be followed out to all their consequences; that the executive administration would be conducted in conformity with the sense of the representatives of the nation; and that no reform, which the two Houses should, after mature deliberation, propose, would be obstinately withstood by the sovereign. The Declaration of Right, though it made nothing law which had not been law before, contained the germ . . . of every good law which had been passed during more than a century and a half, of every good law which may hereafter, in the course of ages, be found necessary to promote the public weal, and to satisfy the demands of public opinion.'[1]

The Bill of Rights.

In the second session of the Convention Parliament, which re-assembled on the 25th of October, 1689, the Declaration of Right was embodied and confirmed, with some slight but important amendments, in a regular Act of the Legislature. The text of the Bill of Rights, the third great Charter of English liberty and the coping-stone of the Constitutional building, is as follows:—

BILL OF RIGHTS.

1 Will. and Mary, Sess. 2, c. 2 (1689).

An Act Declareing the Rights and Liberties of the Subject, and Setleing the Succession of the Crowne.

Recitals.

Presentation of Declaration of Right.

Whereas the Lords Spirituall and Temporall and Commons, assembled at Westminster, lawfully, fully, and freely representing all the Estates of the people of this Realme, did, upon the thirteenth day of February, in the yeare of our Lord One thousand six hundred eighty eight, present unto

[1] Macaulay, Hist. ii. [668].

their Majesties, then called and known by the names and stile of William and Mary, Prince and Princesse of Orange, being present in their proper persons, a certaine Declaration in writeing, made by the said Lords and Commons, in the words following, viz. :—

Its contents:

Illegal and arbitrary acts committed by the late King James II.

Whereas the late King James II. by the advice of diverse evill councellors, judges, and ministers imployed by him, did endeavour to subvert and extirpate the Protestant religion, and the lawes and liberties of this kingdome :—

1. By assumeing and exerciseing a power of dispensing with and suspending of lawes, and the execution of lawes, without consent of Parlyament.

2. By committing and prosecuting diverse worthy prelates, for humbly petitioning to be excused from concurring to the same assumed power.

3. By issueing and causeing to be executed a commission under the Great Seale for erecting a court, called the Court of Commissioners for Ecclesiasticall Causes.

4. By levying money for and to the use of the Crowne, by pretence of prerogative, for other time, and in other manner than the same was granted by Parlyament.

5. By raising and keeping a standing army within this kingdome in time of peace, without consent of Parlyament, and quartering soldiers contrary to law.

6. By causing severall good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and imployed contrary to law.

7. By violating the freedome of election of members to serve in Parlyament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable onely in Parlyament; and by diverse other arbitrary and illegal courses.

9. And whereas of late yeares, partiall, corrupt, and unqualifyed persons have been returned and served on juryes in tryalls, and particularly diverse jurors in tryalls for high treason, which were not freeholders.

10. And excessive baile hath beene required of persons committed in criminall cases, to elude the benefitt of the lawes made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegall and cruell punishments inflicted.

12. And severall grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whome the same were to be levyed.

All which are utterly and directly contrary to the knowne lawes and statutes, and freedome of this realme.

And whereas the said late King James the Second haveing

abdicated the government, and the throne being thereby vacant, his Highnesse the Prince of Orange (whome it hath pleased Almighty God to make the glorious instrument of delivering this kingdome from Popery and arbitrary power) did (by the advice of the Lords Spirituall and Temporall, and diverse principall persons of the Commons) cause letters to be written to the Lords Spirituall and Temporall, being Protestants, and other letters to the severall countyes, cityes, universities, burroughs, and Cinque Ports, for the choosing of such persons to represent them, as were of right to be sent to Parlyament, to meete and sit at Westminster upon the two and twentyeth day of January, in this yeare One thousand six hundred eighty and eight, in order to such an establishment, as that their religion, lawes and liberties might not againe be in danger of being subverted; upon which letters elections having beene accordingly made.

Abdication and consequent vacancy of the throne.

Summons of the Convention Parliament.

And thereupon the said Lords Spirituall and Temporall, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best meanes for attaining the ends aforesaid, doe in the first place (as their auncesters in like case have usually done) for the vindicating and asserting their auntient right and liberties, declare :—

Declaration that the acts previously enumerated are illegal.

1. That the pretended power of suspending of laws, or the execution of laws, by regall authority, without consent of Parlyament is illegall.

2. That the pretended power of dispensing with laws, or the execution of laws, by regall authoritie, as it hath beene assumed and exercised of late, is illegall.[1]

3. That the commission for erecting the late Court of Commissioners for Ecclesiasticall Causes, and all other commissions and courts of like nature, are illegall and pernicious.

4. That levying money for or to the use of the Crowne by pretence of prerogative, without grant of Parlyament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subject to petition the King, and all commitments and prosecutions for such petitioning are illegall.[2]

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[1] *Supra*, p. 329. In drawing up the Declaration of Right the Lords were unwilling absolutely to condemn the Dispensing power, and therefore inserted the qualifying words, 'as it hath been assumed and exercised of late;' the effect of which is to reserve to the Crown the prerogative of pardoning criminals or commuting their sentences. By sec. XII. of the Bill of Rights [*infra*, p. 688] the Dispensing power was absolutely abolished, except in such cases as should be specially provided for by a Bill to be passed during the then present session. No such Bill was, however, passed.

[2] On the right of petitioning see *supra*, p. 641. The Act 13 Car. II. c. 5, against *tumultuous* petitioning was not affected by this clause of the Bill of Rights. [On Petitions of Right, see *post*, Appendices.—ED.]

6. That the raising or keeping a standing army within the kingdome in time of peace, unless it be with consent of Parlyament, is against law.[1]

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.[2]

8. That elections of members of Parlyament ought to be free.

9. That the freedome of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament.

10. That excessive baile ought not to be required nor excessive fines imposed; nor cruell and unusuall punishment inflicted.

11. That jurors ought to be duely impannelled and returned, and jurors which passe upon men in trialls for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegall and void.

13. And that for redresse of all grievances, and for the amending, strengthening, and preserveing of the lawes, Parlyament ought to be held frequently.

And they doe claime, demand, and insist upon all and singular the premisses, as their undoubted rights and liberties; and that noe declarations, judgments, doeings or proceedings, to the prejudice of the people in any of the said premisses, ought in anywise to be drawne hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highnesse the Prince of Orange, as being the onely means for obtaining a full redresse and remedy therein.

Haveing therefore an intire confidence that his said Highnesse the Prince of Orange will perfect the deliverance soe farr advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties:

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[1] *Supra*, p. 666, *n.* 1.

[2] This declaration (says Blackstone) of the right of the subject to carry arms proper for his defence 'is a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanction of society and laws are found insufficient to restrain the violence of oppression.' There is an ancient enactment, however (2 Edw. III. c. 3), against going armed under such circumstances as may 'tend to terrify the people,' or indicate an intention of disturbing the public peace; and by a modern statute (60 Geo. III. c. 1) the training of persons without lawful authority to the use of arms is prohibited; and any Justice of the Peace is authorised to disperse such assemblies of persons as he may find engaged in that occupation, and to arrest any of the persons present.—Stephen, Commentaries (5th ed.), i. 154, and, as to the authority under which the Volunteer Rifle Corps are trained, ii. 610.

II. The said Lords Spirituall and Temporall, and Commons, assembled at Westminster, doe resolve, that William and Mary, Prince and Princesse of Orange, be, and be declared, King and Queene of England, France and Ireland, and the dominions thereunto belonging, to hold the Crowne and royall dignity of the said kingdomes and dominions to them the said Prince and Princesse dureing their lives, and the life of the survivour of them; and that the sole and full exercise of the regall power be onely in, and executed by the said Prince of Orange, in the names of the said Prince and Princesse, dureing their joynt lives; and after their deceases, the said Crowne and royall dignitie of the said kingdomes and dominions, to be to the heires of the body of the said Princesse; and for default of such issue to the Princesse Anne of Denmarke, and the heires of her body; and for default of such issue to the heires of the body of the said Prince of Orange. And the Lords Spirituall and Temporall, and Commons, do pray the said Prince and Princesse to accept the same accordingly.

Bestowal of the Crown on William and Mary, according to limitations mentioned.

III. And that the oathes hereafter mentioned be taken by all persons of whome the oathes of allegiance and supremacy might be required by law, instead of them; and that the said oathes of allegiance and supremacy be abrogated.

New oaths in lieu of the old oaths of allegiance and supremacy.

I, A. B., doe sincerely promise and sweare, That I will be faithfull and beare true allegiance to their Majestyes King William and Queene Mary:

Allegiance.

Soe helpe me God.

I, A. B., doe sweare, That I doe from my heart abhorr, detest, and abjure as impious and hereticall, this damnable doctrine and position, that Princes excommunicated or deprived by the Pope, or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I doe declare, That noe forreigne prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authoritie, ecclesiasticall or spirituall, within this realme:

Supremacy.

Soe helpe me God.

IV. Upon which their said Majestyes did accept the Crowne and royall dignitie of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

Acceptance of the Crown by William and Mary.

V. And thereupon their Majestyes were pleased, that the said Lords Spirituall and Temporall, and Commons, being the two Houses of Parlyament, should continue to sitt, and with their Majestyes royall concurrence make effectual provision for the settlement of the religion, lawes, and liberties of this kingdome, soe that the same for the future might not be in danger againe

Agreement between their Majesties and the Convention that the latter, being the two

Houses of Parliament, should continue to sit.

of being subverted; to which the said Lords Spirituall and Temporall, and Commons, did agree and proceede to act accordingly.

Formal ratification and confirmation of Declaration of Right.

VI. Now in pursuance of the premisses, the said Lords Spirituall and Temporall, and Commons, in Parlyament assembled, for the ratifying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due forme by authority of Parlyament, doe pray that it may be declared and enacted, That all and singular the rights and liberties asserted and claimed in the said declaration are the true, auntient, and indubitable rights and liberties of the people of this kingdome, and soe shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majestyes and their successors according to the same in all times to come.

Recognition and declaration of their Majesties' title as King and Queen of England, France, and Ireland, and the dominions thereunto belonging.

VII. And the said Lords Spirituall and Temporall, and Commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and mercifull goodness to this nation, to provide and preserve their said Majestyes' royall persons most happily to raigne over us upon the throne of their auncestors, for which they render unto Him from the bottome of their hearts their humblest thanks and praises, doe truly, firmely, assuredly, and in the sincerity of their hearts, thinke, and doe hereby recognize, acknowledge, and declare, that King James the Second haveing abdicated the government, and their Majestyes haveing accepted the Crowne and royall dignity aforesaid, their said Majestyes did become, were, are, and of right ought to be, by the lawes of this realme, our soveraigne liege Lord and Lady, King and Queene of England, France, and Ireland, and the dominions thereunto belonging, in and to whose princely persons the royall State, Crowne, and dignity of the same realmes, with all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully, and intirely invested and incorporated, united, and annexed.

Settlement of the Crown and limitations of the succession.

VIII. And for preventing all questions and divisions in this realme, by reason of any pretended titles to the Crowne, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend, the said Lords Spirituall and Temporall, and Commons, doe beseech their Majestyes that it may be enacted, established, and declared, that the Crowne, and regall government of the said kingdoms and dominions, with all and singular the premisses thereunto belonging and appertaining, shall bee and continue to their said Majestyes, and the survivour of them, during their lives, and the life of the survivour of

them. And that the entire, perfect, and full exercise of the regall power and government be onely in, and executed by, his Majestie, in the names of both their Majestyes dureing their joynt lives; and after their deceases the said Crowne and premisses shall be and remaine to the heires of the body of her Majestie; and for default of such issue, to her Royall Highnesse the Princesse Anne of Denmarke, and the heires of her body; and for default of such issue, to the heires of the body of his said Majestie: and thereunto the said Lords Spirituall and Temporall, and Commons, doe, in the name of all the people aforesaid, most humbly and faithfully submitt themselves, their heires and posterities, for ever: and doe faithfully promise, That they will stand to, maintaine, and defend their said Majestyes, and alsoe the limitation and succession of the Crowne herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

Exclusion from the succession of Papists and of persons marrying Papists.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdome, to be governed by a Popish Prince, or by any King or Queene marrying a Papist, the said Lords Spirituall and Temporall and Commons, doe further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be for ever uncapeable to inherit, possesse, or enjoy the Crowne and government of this realme and Ireland, and the dominions thereunto belonging, or any part of the same, or to have, use, or to exercise any regall power, authoritie, or jurisdiction within the same; and in all and every such case or cases the people of these realmes shall be and are hereby absolved of their allegiance, and the said Crowne and government shall from time to time descend to, and be enjoyed by, such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons soe reconciled, holding communion, or professing or marrying as aforesaid, were naturally dead.[1]

Declaration to be made by every King or Queen hereafter succeeding to the crown.

X. And that every King and Queene of this realme, who at any time hereafter shall come to and succeede in the Imperiall Crowne of this kingdome, shall, on the first day of the meeting of the first Parlyament, next after his or her comeing to the Crowne, sitting in his or her throne in the House of Peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coro-

[1] This provision, although not included in the Declaration of Right, was in accordance with the previous Resolution of the Convention, that it was contrary to the interests of the kingdom to be governed by a Papist.

nation oath to him or her, at the time of his or her takeing the said oath (which shall first happen), make, subscribe, and audibly repeate the declaration mentioned in the statute made in the thirtyeth yeare of the raigne of King Charles the Second, entituled 'An Act for the more effectuall preserveing the King's person and government, by disableing Papists from sitting in either House of Parlyament.' But if it shall happen, that such King or Queene, upon his or her succession to the Crowne of this realme, shall be under the age of twelve years, then every such King or Queene shall make, subscribe, and audibly repeate the said declaration at his or her coronation, on the first day of meeting of the first Parlyament as aforesaid, which shall first happen after such King or Queene shall have attained the said age of twelve years.[1]

Enacting clause.

XI. All which their Majestyes are contented and pleased shall be declared, enacted, and established by authoritie of this present Parlyament, and shall stand, remaine, and be the law of this realme for ever; and the same are by their said Majestyes, by and with the advice and consent of the Lords Spirituall and Temporall, and Commons, in Parlyament assembled, and by the authoritie of the same, declared, enacted, and established accordingly.

Dispensing power abolished.

XII. And bee it further declared and enacted by the authoritie aforesaid, That from and after this present session of Parlyament, noe dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of noe effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed dureing this present session of Parlyament.[2]

Exception in favour of charters, grants, and pardons made before 23 Oct., 1689.

XIII. Provided that noe charter, or grant or pardon granted before the three-and-twentyeth day of October, in the yeare of our Lord one thousand six hundred eighty nine, shall be any ways impeached or invalidated by this Act, but that the same shall be and remaine of the same force and effect in law, and noe other, then as if this Act had never beene made. (*Statutes of the Realm*, vi. 142—145.)

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[1] This clause supplements the preceding by enacting that every English sovereign shall, as a test of non-popery, repeat and subscribe, in full Parliament or at the coronation, the Declaration against Transubstantiation, Adoration of the Virgin, and the Sacrifice of the Mass, contained in the Parliamentary Test Act of the 30th Car. II. st. 2, c. 1.—See *supra*, p. 656.

[2] [No such Bill, however, was passed.—ED.]

CHAPTER XVI.

PROGRESS OF THE CONSTITUTION SINCE THE REVOLUTION.

THE ACT OF SETTLEMENT: THE CABINET SYSTEM.

THE Revolution of 1688 marks at once a resting-place and a fresh point of departure in the history of the English Constitution. The Bill of Rights was a summing up, as it were, and final establishment of the Legal bases of the Constitution. With Magna Charta and the Petition of Right it forms the Legal Constitutional Code, to which no additions of equal importance (except the Constitutional provisions of the Act of Settlement to be presently noticed) have since been made by Legislative enactment. Political progress has indeed, from time to time, left its mark on the statute-book, in laws the importance of which can hardly be exaggerated. But even the greatest of these enactments—the Reform Act of 1832, supplemented by the Act of 1867—have been of the nature of amendments to the machinery of the Constitution, supplying defects and correcting abuses, rather than alterations in the great Constitutional principles finally established by the Revolution.

[The Bill of Rights completes] the Legal Code of the Constitution.

As might however be expected in a living organism, the Constitution has not remained stationary during a period of nearly two centuries. But its greatest changes have not been brought about by Legislative enactment. Whilst the Legal code has remained substantially unaltered, there has grown up by its side a purely unwritten and Conven-

Growth of the unwritten or customary Constitution.

tional code,[1] which, firmly established as a part of the Constitution though still unknown to the Law, has so completely modified the practical working of the Legal code, as to form a present Constitution which would be scarcely recognisable, except in its fundamental principles, by the authors of the Bill of Rights. The doctrines of Divine Hereditary right, of Absolute Royal power, of the Passive Obedience of the subject, were negatived once and for ever by the Revolution, and the rule of Parliament was definitively established; but the mode of exercising that rule has since become something wholly different from what it then was, and in its present form of Parliamentary government through a Cabinet Ministry, forms the main characteristic of our Constitutional system.

Act of Settlement 1700–1701.

The history of this remarkable development has now to be briefly considered, but before doing so, it will be convenient to set out the text of the Act of Settlement (12 & 13 Will. III. c. 2), a statute important not only on account of the group of Constitutional provisions embodied in it, which were to take effect from the accession of the House of Hanover, but also as the Title Deed of the reigning Dynasty, and a veritable Original Contract between the Crown and the People.[2]

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[1] See Freeman, Growth of Eng. Const., p. 112.

[2] The Act of Settlement is characterised by Hallam (Const. Hist. iii. 196) as 'the seal of our constitutional laws, the complement of the Revolution itself and the Bill of Rights, and the last great statute which restrains the power of the Crown.

ACT OF SETTLEMENT.

12 & 13 Will. III., c. 2 (1700 and 1701).

An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject.[1]

Recital of Stat. 1 *W. & M. sess.* 2, *c.* 2, § 2,

Whereas in the first year of the reign of your Majesty, and of our late most gracious Sovereign Lady Queen Mary (of blessed memory), an Act of Parliament was made, intituled, *An Act for Declaring the Rights and Liberties of the Subject, and for settling the Succession of the Crown*, wherein it was (amongst other things) enacted, established, and declared, That the Crown and Regall Government of the kingdoms of England, France, and Ireland, and the Dominions thereunto belonging, should be and continue to your Majestie and the said late Queen, during the joynt lives of your Majesty and the said Queen, and to the survivor: And that after the decease of your Majesty and of the said Queen, the said Crown and Regall Government should be and remain to the heirs of the body of the said late Queen: and for default of such issue, to her Royall Highness the Princess Ann of Denmark and the heirs of her body: and for default of such issue, to the heirs of the body of your Majesty. And it was thereby further enacted, That all and every person and persons that then were or afterwards should be reconciled to or shall hold communion with the See or Church of Rome, or should professe the Popish Religion, or marry a Papist, should be excluded, and are by that Act made for ever incapable to inherit, possess, or enjoy the Crown and Government of this Realm and Ireland and the Dominions thereunto belonging, or any part of the same, or to have, use, or exercise any Regall power, authority, or jurisdiction, within the same: And in all and every such case and cases the people of these Realms shall be and are thereby absolved of their allegiance: and that the said Crown and Government shall from time to time descend to and be enjoyed by such person or persons, being Protestants, as should have inherited and enjoyed the same in case the said person or persons so reconciled, holding communion, professing, or marrying as aforesaid, were naturally dead. After the making of which Statute and the Settlement therein contained, your Majestie's good subjects, who were restored to the full and free possession and enjoyment of their Religion, Rights, and Liberties, by the providence of God giving success to your Majestie's just undertaking and unwearied endeavours for that purpose, had no greater temporall felicity to hope or wish for

[1] Rot. Parl. 12 & 13 Gul. III. p. 1, n. 2; Revised Statutes, ii. 93.

then [than] to see a Royall Progeny descending from your Majesty, to whom (under God) they owe their tranquility, and whose ancestors have for many years been principall assertors of the Reformed Religion and the liberties of Europe, and from our said most gracious Sovereign Lady, whose memory will always be precious to the subjects of these Realms: And it having since pleased Almighty God to take away our said Sovereign Lady, and also the most hopefull Prince William Duke of Gloucester (the only surviving issue of her Royall Highness the Princess Ann of Denmark), to the unspeakable grief and sorrow of your Majesty and your said good subjects, who, under such losses, being sensibly put in mind that it standeth wholly in the pleasure of Almighty God to prolong the lives of your Majesty and of her Royall Highness, and to grant to your Majesty, or to her Royall Highness, such issue as may be inheritable to the Crown and Regall Government aforesaid by the respective limitations in the said recited Act contained, doe constantly implore the Divine mercy for those blessings: And your Majestie's said subjects having daily experience of your royall care and concern for the present and future welfare of these kingdoms, and particularly recommending from your throne a further provision to be made for the Succession of the Crown in the Protestant line for the happiness of the Nation and the security of our Religion; and it being absolutely necessary for the safety, peace, and quiet of this Realm to obviate all doubts and contentions in the same by reason of any pretended titles to the Crown, and to maintain a certainty in the Succession thereof to which your subjects may safely have recourse for their protection in case the limitations in the said recited Act should determine: Therefore, for a further provision of the Succession of the Crown in the Protestant line, we, your Majestie's most dutifull and loyall subjects, the Lords Spirituall and Temporall, and Commons, in this present Parlyament assembled, do beseech your Majesty that it may be enacted and declared, and be it enacted and declared by the King's most excellent Majesty, by and with the advice and consent of the Lords Spirituall and Temporall, and Commons, in this present Parliament assembled, and by the authority of the same, That the most excellent Princess Sophia, Electress and Dutchess Dowager of Hannover, daughter of the most excellent Princess Elizabeth, late Queen of Bohemia, daughter of our late Sovereign Lord King James the First, of happy memory, be and is hereby declared to be the next in succession in the Protestant line to the Imperiall Crown and Dignity of the said Realms of England, France, and Ireland, with the Dominions and territories thereunto belonging, after his Majesty and the Princess Ann of Denmark, and in default of issue of the said Princess Ann and of his Majesty respectively; and that from and after the deceases of his said Majesty our now Sovereign Lord, and of her Royall

and that the late Queen and Duke of Gloucester are dead;

and that his Majesty had recommended from the throne a further provision for the Succession of the Crown in the Protestant line.

The Princess Sophia, Electress and Duchess Dowager of Hanover, daughter of the late Queen of Bohemia, daughter of King James I., declared next Successor to

Highness the Princess Ann of Denmark, and for default of issue of the said Princess Ann and his Majesty respectively, the crown and Regall Government of the said kingdoms of England, France, and Ireland, and of the dominions thereunto belonging, with the Royal State and Dignity of the said Realms, and all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions, and authorities, to the same belonging and appertaining, shall be, remain, and continue to the said most excellent Princess Sophia and the heirs of her body, being Protestants: And thereunto the said Lords Spirituall and Temporall, and Commons, shall and will in the name of all the people of this Realm most humbly and faithfully submit themselves, their heirs, and posterities; and do faithfully promise that after the deceases of his Majesty and her Royall Highness, and the failure of the heirs of their respective bodies, to stand to, maintain, and defend the said Princess Sophia and the heirs of her body, being Protestants, according to the Limitation and Succession of the Crown in this Act specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

the Crown after the King and the Princess Anne, in default of issue of the said Princess and his Majesty respectively; and the heirs of her body, being Protestants.

II. Provided always and it is hereby enacted that all and every person and persons who shall or may take or inherit the said Crown by vertue of the limitation of this present Act, and is, are, or shall be reconciled to or shall hold communion with the See or Church of Rome, or shall profess the Popish Religion, or shall marry a Papist, shall be subject to such incapacities as in such case or cases are by the said recited Act provided enacted and established: And that every King and Queen of this Realm, who shall come to and succeed in the Imperiall Crown of this kingdom by vertue of this Act, shall have the Coronation Oath administered to him, her, or them, at their respective coronations, according to the Act of Parliament made in the first year of the reign of his Majesty and the said late Queen Mary, intituled An Act for establishing the Coronation Oath, and shall make, subscribe, and repeat the Declaration in the Act first above recited, mentioned, or referred to in the manner and form thereby prescribed.

The persons inheritable by this Act, holding communion with the Church of Rome incapacitated as by the former Act; [those succeeding] shall take the oath at their coronation according to Stat. 1 W. & M. c. 6.

III. And whereas it is requisite and necessary that some further provision be made for securing our Religion, Laws, and Liberties, from and after the death of his Majesty and the Princess Ann of Denmark, and in default of issue of the body of the said Princess and of his Majesty respectively: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spirituall and Temporall, and Commons, in Parliament assembled, and by the authority of the same:—

Further provisions for securing the Religion, Laws, and Liberties of these Realms.

(1) *That whosoever shall hereafter come to the possession of this Crown, shall joyn in communion with the Church of England as by law established.*

CONSTITUTIONAL PROVISIONS.

(2) *That in case the Crown and Imperiall Dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to ingage in any warr for the defence of any dominions or territories which do not belong to the Crown of England, without the consent of Parliament.*

(3) [That no person who shall hereafter come to the possession of this Crown shall go out of the dominions of England, Scotland, or Ireland, without consent of Parliament.][1]

(4) [That from and after the time that the further limitation by this Act shall take effect, all matters and things relating to the well-governing of this kingdom, which are properly cognisable in the Privy Councill by the laws and customs of this realme, shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Councill as shall advise and consent to the same.][2]

(5) [That after the said limitation shall take effect as aforesaid, no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging, (although he be naturalised or made a denizen), except such as are born of English parents, shall be capable to be of the Privy Councill, or a member of either House of Parliament, or to enjoy any office or place of trust, either civill or military, or to have any grant of lands, tenements, or hereditaments from the Crown to himself, or to any other or others in trust for him.][3]

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[1] This clause was repealed by 1 Geo. I. stat. 2, c. 51.

[2] Repealed by 4 Anne, c. 8, s. 24. [Revised Stat. 4 & 5 Anne, c. 20, s. 27.]

Aliens.

[3] Repealed by 7 & 8 Vict. c. 66 (Mr. Hutt's Naturalisation Act) *as to such parts* as are inconsistent with the provisions of that Act (viz., secs. 3, 5, 6 and 16). The statute 7 & 8 Vict. c. 66, is itself repealed by 33 & 34 Vict. c. 14 (the Naturalisation Act, 1870), by sec. 7 of which last Act the above clause of the Act of Settlement is *virtually* repealed as to all persons obtaining a certificate of naturalisation. This 5th clause of the Constitutional provisions of the Act of Settlement was founded, like the 2nd and 3rd, on a very reasonable jealousy of a foreign king and foreign favourites. It was confirmed by statute 1 Geo. I. st. 2, c. 4, which, 'for the better preserving the said clause in the said Act entire and inviolate,' provided that no Bill for the naturalisation of any person should be received without a clause disqualifying him from sitting in Parliament or enjoying the prohibited offices or places of trust. Jealousy of aliens was at this time specially strong in consequence of the conduct of William III. in appointing foreigners who accompanied him from Holland to high positions in the English State, but the feeling had always existed more or less. By the Common Law aliens were incapacitated from holding land or any public office, and even from exercising any civil rights. Magna Charta (*supra*, p. 143) granted certain privileges to foreign merchants, but all aliens dwelling in England long remained subject to higher taxation and to many vexatious restrictions, more particularly as to retail trade. By stat. 32 Hen. VIII. c. 16, they were further prohibited from taking any shop or dwelling-house on lease, and they were at all times liable to be ordered by the Crown to quit the realm. The last occasion on which this right of expulsion was exercised occurred in 1575 under Elizabeth. An alien might become, to a certain extent, an English subject, either by *denization* under the king's letters patent, or by *naturalisation* by Act of Parliament, the latter mode not merely enabling him to hold

Their disabilities by Common Law.

Magna Charta.

Stat. 32 *Hen. VIII. c.* 16.

Denization and naturalisation.

(6) [That no person who has an office or place of profit under

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land, but to inherit it from others and to transmit it by inheritance to his children, whether born before or after his naturalisation. By stat. 7 Jac. I. c. 2, it was, however, enacted that no person should be naturalised unless he should first take the oaths of allegiance and supremacy in the presence of the Parliament and also take the sacrament. But as it was impossible to limit the action of future Parliaments, these provisions, as well as those of the 1 Geo. I. st. 2, c. 4, for insuring the observance of the 5th clause of the Act of Settlement, were occasionally dispensed with by special Acts of Parliament passed previously to the introduction of Bills for the naturalisation of particular individuals. In 1708 one general Act was passed (7 Anne, c. 5) for the naturalisation of all foreign Protestants, but this was repealed three years afterwards. In 1753, the famous Jew Bill was passed (26 Geo. II. c. 26) enabling foreign Jews to be naturalised without taking the sacrament as required by the 7 Jac. I. c. 2; but the popular dislike excited by this measure was so great that it was repealed in the following session of Parliament. At length, in 1825, by 6 Geo. IV. c. 67, the preliminary sacramental test imposed by the 7 Jac. I. c. 2, was abolished in all cases; and in 1844 the provision of 1 Geo. I. st. 2, c. 4, as to naturalisation bills was also repealed by 7 & 8 Vict. c. 66, s. 2. While in the interest, or supposed interest, of the English people, aliens were subjected to certain disabilities, and even to liability to expulsion when the safety of the State should require it, their right of asylum against foreign governments was ever maintained inviolate. But in 1793 the suspicion that some of the political refugees who came over in great numbers at the time of the French Revolution were in league with Democratic associations in England in conspiracies against the Government, led to the passing of an Alien Act (33 Geo. III. c. 4) placing all foreigners under strict surveillance, and empowering the Secretary of State to remove any who were suspected out of the realm. The Alien Act, which was passed for one year only, was renewed from time to time, but its more stringent provisions were relaxed as soon as peace was temporarily restored in 1802. In that year the arrogant demand of Napoleon, First Consul of the French Republic, that we should 'remove out of the British dominions all the French princes and their adherents, together with the bishops and other individuals whose political principles and conduct must necessarily occasion great jealousy to the French Government,' was firmly refused, except in the single instance of M. Georges, who, having been concerned in circulating papers hostile to the Government in France, was removed from our European dominions. On the resumption of the war the Alien Act was again renewed in its integrity; after the peace of 1814, its provisions were again relaxed; and from 1816 its re-enactment, even in a modified form, was strongly opposed in Parliament, until its final abandonment in 1826. The registration of aliens was still, however, insisted on, and fresh provisions for this purpose were enacted in 1836 by the 6 & 7 Will. IV. c. 11; but their execution has gradually fallen into disuse. During the political disturbances of 1848 the English Executive were empowered by Parliament (11 & 12 Vict. c. 20), for the space of one year, to remove from the kingdom any foreigners who should be considered dangerous to its peace, but this power was never exercised. In the meantime, in 1844, the naturalisation of aliens had been greatly facilitated by Mr. Hutt's Act, 7 & 8 Vict. c. 66, which enabled them, on obtaining a certificate from the Home Secretary, and taking the oath of allegiance, to acquire all the rights and capacities of natural-born British subjects, except the capacity of becoming a member of either House of Parliament, or of the Privy Council, or any other rights and capacities specially excepted in the certificate. This Act has since been repealed by the Naturalisation Act of 1870 (33 & 34 Vict. c. 14, amended by 35 & 36 Vict. c. 39), which has completely altered the status of aliens and naturalised subjects, upsetting the ancient maxim, "*nemo patriam in quâ natus est exuere, aut ligeantiae debitum ejurare, potest*," and rendering much of the learning as to allegiance and aliens contained in the famous

Stat. 7 *Jac. I. c.* 2.

Stat. 1 *Geo. I. st.* 2, *c.* 4.

The 'Jew Bill,' 1753.

Right of Asylum.

Alien Act, 1793.

Registration of aliens, 1836.

Mr. Hutt's Naturalization Act, 1844.

Naturalization Act, 1870.

Repealed 4 Anne, c. 8, s. 25 [Rev. Stat. 4 & 5 Anne, c. 20, s. 28].

the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons.]

(7) *That after the said limitations shall take effect as aforesaid, judges' commissions be made* quamdiu se bene gesserint *and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawfull to remove them.*[1]

(8) *That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.*[2]

Other provisions enacted in lieu, by 6 Anne, c. 7.

General confirmation of the Laws and Statutes of the realm for securing the established religion and the rights and liberties of the people.

IV. And whereas the Laws of England are the birthright of the people thereof, and all the Kings and Queens who shall ascend the throne of this Realm ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same; the said Lords Spirituall and Temporall, and Commons, do therefore further humbly pray, That all the Laws and Statutes of this Realm for securing the Established Religion, and the Rights and Liberties of the people thereof, and all other laws and statutes of the same now in force, may be ratified and confirmed: And the same are by his Majesty, by and with the advice and consent of the said Lords Spirituall and Temporall, and Commons, and by authority of the same, ratified and confirmed accordingly.

GROWTH OF THE CABINET.

The 4th and 6th of the Constitutional clauses of the Act of Settlement, although repealed in Queen Anne's reign before they could come into operation, call for some detailed comment, and lead us to a consideration of the growth of Cabinet government.[3] The fourth clause was

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Naturalised Alien now invested with political as well as other rights of natural-born subject.

Calvin's case (*supra*, p. 518, *n.* 2), and in subsequent cases, now only historically interesting. Under the existing law an alien may take, acquire, hold, and dispose of real and personal property in the United Kingdom, of every description (except British ships) in the same manner in all respects as a natural-born British subject, but without the right to any office or franchise, municipal, parliamentary, or other; and on obtaining a certificate of naturalisation from one of Her Majesty's Principal Secretaries of State, he becomes entitled, in the United Kingdom, to all *political* and other rights and privileges, and subject to all the obligations, of a natural-born subject. It is also provided that a natural-born subject may become a "statutory alien" by being voluntarily naturalised in a Foreign State, and may again acquire British nationality by permission of a Secretary of State.

[1] This important provision, which established the independence of the Judicial bench, as well as the provision in the 8th clause that the Royal pardon should not be pleadable to an impeachment, had been omitted in the hasty and imperfect Bill of Rights. *Supra*, p. 681.

[2] See *supra*, p. 546, *n.*

[3] [It should be noticed that Continental writers are apt to use the expression 'Cabinet' in a broad sense, as equivalent to 'Ministry.' Such is its application, *e.g.*, in an interesting article, *Del Governo Parlamentare*, by A. Romano

intended to put a stop to a very remarkable change which had been silently effected in the executive functions of the King's Ordinary or Privy Council: the sixth, had it not been repealed, would have entirely severed the connection between the House of Commons and the Executive.

The *Concilium Ordinarium.*

Of the *Concilium Ordinarium* something has already been said in an earlier chapter of this work.[1] Consisting of the chief officers of the Court, of the two Archbishops, and of certain leading members of the baronage selected by the King, the Ordinary or Continual Council was originally a kind of permanent committee of the 'Great Council' or 'Common Council' of the realm, sitting for the despatch of executive business during the intervals between the meetings of the larger assembly, but becoming merged in that assembly whenever it was convened. Gradually, however, the nature both of the Common Council and of the Ordinary Council underwent a change. As with the rise of the House of Commons the 'Common Council' developed into the National Parliament, the Ordinary Council tended more and more to become a strictly official body, distinct from the larger assembly out of which it had grown; its members ceased to be appointed exclusively from the ranks of the baronage, clerical or lay, and commoners (not necessarily members of the House of Commons) were admitted to the Council board. In 1404, under Henry IV., the Council consisted of 19 members, of whom

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Catania, in the *Circolo Giuridico* of Palermo, for July and August, 1881. This does not apply to M. Boutmy, who, in *Nouv. Rev. Hist. de Droit*, Paris, 1878, p. 37 *seq.*, Art. *Les Sources de la Const. Angl.*, notices the striking anomaly of the position of the Cabinet, which he justly calls 'ce pivot du régime parlementaire.' Not only the thing, but, as he remarks, the very name, is unknown to the statute law (droit écrit). To the same effect, M. Glasson, *Hist. du Dr. et des Inst. Pol. de l'Angl.*, vol. vi., p. 28, observes, 'En réalité, c'est le Cabinet, appuyé sur la majorité des Chambres, qui a l'initiative de toutes les affaires du gouvernement, et quoiqu'il n'ait pas, comme on le sait, une existence légale, il a complètement relégué au second rang le Conseil privé.' The relegation to an inferior position here spoken of is, of course, to be taken as referring to the share of the Privy Council, as such, in administration, and not to the Judicial aspect of the Council, expanded by the growth of the Colonies.—ED.]

[1] *Supra*, pp. 182, 191–2.

3 were Bishops, 9 Peers, and 7 Commoners. They were bound by a special oath of fidelity and secrecy, and received regular salaries of large amounts. But the Council still remained a checking as well as a ministerial body. It was at once the controller and the servant of the Crown; the instrument of the King's prerogative, and the curb placed by the Baronage on the arbitrary exercise of his will. The number of councillors soon, however, appears to have proved too large for effective administration, and about the time of Henry VI. the more eminent and assiduous members were formed into a select or confidential committee, exercising alone all the administrative functions previously shared with the other members of the Ordinary Council, and distinguished from these latter by the title of Privy Councillors. The oath of secrecy was now only exacted from the Privy Councillors, the ordinary councillors being no longer consulted on purely Executive business, although they continued to take part in the Judicial duties of the Council in its court of Star Chamber.

The Privy Council.

Under Edward VI., in 1533, the Ordinary Council consisted of 40 members (22 being Commoners), and was divided, for Judicial and Administrative purposes, into 5 commissions or committees. The most important of these, composed of eleven noblemen, two Bishops, and seven Commoners (one half of the whole number of Councillors) was styled the Committee 'for the State' and constituted, in fact, the Privy Council. The large number of Commoners, both in the whole Council and in the Committee 'for the State,' marks the change which had silently been effected in the relations between the Council and the Crown. The independence of the Council had rested on the presence of men who could not easily be removed, great hereditary officials and powerful nobles. Under the Tudors the large infusion of Commoners changed the nature of the Council from a mixed checking and administrative, into a purely official body, exercising the whole Executive power of the Crown, and, through the medium of the Star Chamber and of Proclamations, a very large part of the

Judicial and Legislative powers also. On the abolition of the Star Chamber the Judicial functions of the Council fell into abeyance, and the reason for the distinction between Ordinary and Privy Councillors having then ceased to exist, all the members of the Council, from the date of the Restoration, were sworn as Privy Councillors.

The Privy Council continued to be the Constitutional body of advisers of the King, whom he was bound by the laws and customs of the realm to consult. But Charles II. hated the delays and restraints imposed upon his designs by long debates in Council, and having greatly augmented its numbers was able to allege with truth that 'the great number of the Council made it unfit for the secrecy and despatch which are necessary in great affairs.' Availing himself of one of the peculiar characteristics of the Council —its action through committees—Charles formed a small select committee or Cabinet Council,[1] with whom he concerted all measures of importance before submitting them, for a merely formal ratification, to the whole body of Privy Councillors.

The Cabinet Council.

'Formerly,' says Trenchard, writing towards the close of the 17th century, 'all matters of state and discretion were debated and resolved in the privy council, where every man subscribed his opinion and was answerable for it. The late King Charles [II.] was the first who broke this most excellent part of our constitution, by settling a cabal or cabinet council, where all matters of consequence were debated and resolved, and then brought to the privy council to be confirmed.'[2] The word 'cabal' with the meaning of 'club' or 'association of intriguers' had been popularly applied to the secret councillors of the King

[1] 'The . . name of a cabinet council,' says Hallam, 'as distinguished from the larger body, may be found as far back as the reign of Charles I.' (Const. Hist. iii. 182); but it occurs in the preceding reign in the writings of Lord Bacon, who, in treating of the 'inconveniences of counsel,' says, 'for which inconveniences, the doctrine of Italy, and practice of France, in some kings' times, hath introduced *cabinet* counsels: a remedy worse than the disease.' Bacon, Works (ed. Spedding, Ellis & Heath, 1858) vi. 424.

[2] Trenchard, Short History of Standing Armies, p. 9. [Quoted by Hallam, *u. s.*—ED.]

even under James I., and the accidental coincidence that, in 1671, the Cabinet consisted of the five unprincipled ministers, Clifford, Arlington, Buckingham, Ashley, and Lauderdale, the initials of whose names made up the word Cabal, caused the latter designation to be used for some years as synonymous with Cabinet, and did much to bring the Cabinet system of government into disrepute. Moreover, though convenient and even necessary for administrative purposes, Cabinet government, in the form which it assumed at this period, was undoubtedly fraught with great evils. It deprived the Privy Council of all power to check the actions of the King, and vested the real government of the country in a body of Ministers practically irresponsible to the nation. Accordingly, in 1679, an attempt was made, on the advice of Sir William Temple, to restore the Privy Council to its former position. It was remodelled and its numbers reduced from 50 to 30, of whom 15 were the chief officers of State, and the other 15 were made up of 10 Lords and 5 Commoners. The joint income of the new Council was not to fall below £300,000, a sum nearly equal to the estimated income of the whole House of Commons. Temple hoped that a body thus constituted of great nobles and wealthy landed proprietors, too numerous for a Cabal and yet not too numerous for secret deliberation, would form at once a check upon the Crown and a counterbalance to the influence of Parliament. By the advice of this Council of Thirty, Charles II. pledged himself to be guided in all affairs of State; but the pledge was quickly broken, and an interior or Cabinet Council was again formed, which differed from the whole body of the Privy Council as, under Edward VI., the Committee 'for the State,' and under Henry VI., the Privy Council itself, had differed from the Ordinary Council.[1]

The 'Cabal' ministry, 1671.

Temple's scheme for reorganisation of the Privy Council, 1679.

The Cabinet system resumed.

This distinction of the Cabinet from the Privy Council

[1] An excellent sketch of the history of the Privy Council will be found in Mr. A. V. Dicey's Arnold Prize Essay, Oxford, 1860, to which the author was indebted for several of the details in the text.

has ever since continued. The Privy Council[1] still remains the only legally recognised body, but the Cabinet, though altogether unknown to the Law, and for a long time regarded as unconstitutional and dangerous, has gradually drawn to itself the chief Executive power, and become, by universal consent and usage, the essential feature of our system of Parliamentary government. The firm establishment of the Cabinet system has, however, only been rendered possible and advantageous by a gradual, but long since completed, change in its essential characteristics. Under the last two Stuarts the Cabinet was, in truth, a cabal of the king's servants for sustaining the authority of the Crown, not only against its legally authorised Privy Councillors, but against the wishes and power of Parliament. Since the Revolution it has become a Ministry,[2] nominally appointed by the Sovereign, but in reality an Executive Committee of the two Houses of Parliament, practically chosen by the majority of the House of Commons.

Change in its essential characteristics.

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[1] Since the time of Charles II. the number of Privy Councillors has been greatly augmented, and is now indefinite. The appointment, which confers the title of 'Right Honourable,' is frequently given as an honorary reward for important political services; but no Privy Councillor attends a meeting of the Council unless specially summoned, and 'with the exception of such of them as are called *cabinet ministers*, the privy councillors are not in modern practice ordinarily summoned to advise the sovereign on affairs of State.' (Stephen, Com. 5th ed. ii. 476.) The right to attend without summons was, however, asserted by the Dukes of Argyle and Somerset on the memorable occasion of Queen Anne's last Council in 1714, when they suddenly appeared unbidden at the Council board, and disconcerted the plans of the Jacobites. (See Lord Mahon's Hist. of Eng. i. 91.)

[2] In 1711 the Earl of Scarsdale, in the House of Lords, having proposed a Resolution in which the responsible advisers of the Crown were referred to as the 'Cabinet Council,' afterwards substituted the word 'Ministers' as being 'better known.' This alteration gave rise to a discussion, in the course of which some peers maintained that 'Ministers' and 'Cabinet Council' were synonymous, others that there might be a difference. The Duke of Argyle thought 'all ministers were of the Cabinet Council, but that all the Cabinet Council were not ministers;' Lord Ferrers that 'the word Ministry is more copious than Cabinet Council.' Lord Cowper maintained that they were both terms of an uncertain signification, and 'Cabinet Council' a word 'unknown in our law;' while the Earl of Peterborough observed that 'he had heard a distinction between the Cabinet Council and the Privy Council; that the Privy Councillors were such as were thought to know everything, and knew nothing, and those of the Cabinet Council thought nobody knew anything but themselves.' Cobbett's Parl. Hist. vi. 971.

Party government.

This result is mainly due to the division of the English people, and consequently of the Parliament, into two great political parties which have contended one against the other for the control of the executive power. The origin of the Whigs and Tories, and their essential points of difference, have been already considered.[1] It was not, however, until the accession of George I. that government by party was fully established. The Whigs, who had secured the Crown to William III., expected that he would choose his Ministers solely from their ranks. But the King was strongly opposed to government by party. He wished to retain the chief directing power himself, and to secure the support of a united Parliament in carrying out his Continental policy of opposition to Louis XIV. of France. Accordingly, down to the year 1693, he distributed the chief offices in the government about equally between the two parties. But this policy, while it maintained the chief efficient power in the hands of the King, not only failed to secure unanimity among the various Ministers of the Crown, but even allowed of open hostility between them, as well in the discharge of their executive duties as in the discussions in Parliament. The inconvenience of this state of things was so great that at length, between 1693 and 1696, acting on the advice of Robert, Earl of Sunderland, William abandoned the neutral position which he had hitherto maintained between the two parties, and entrusted all the chief administrative offices to the Whigs, who commanded a majority in the House of Commons. The close union of the Whig leaders, each promptly defending his colleagues against every attack, was so novel a spectacle that they became popularly known as 'the Junto.'[2] But the Ministerial system of government

William III. opposed to it;

but adopts it on the advice of Sunderland.

'The Junto.'

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[1] *Supra*, pp. 660–62.

[2] [This body may be described in the words of Green, *Hist. Eng. People*, iv. 61, as 'a group of statesmen,' at the head of the Whig party, 'whose close union in thought and action gained them the name of the Junto.' The name itself would appear to be a somewhat distorted form of the Spanish *Junta*, which perhaps does not really bear any closer sense of union than that which may or may not prevail among members of the same Board or Committee, though

in its modern form was by no means as yet completely established. When, at the general election of 1698, a House of Commons was returned adverse to the Junto, and Montagu, who, as First Lord of the Treasury, had for four years occupied the position and wielded the power of leader of the House, ceased to exercise any control over it, the Ministry, instead of resigning office to their adversaries, as statesmen similarly situated would now act, kept their places. Thus the old want of harmony between the servants of the Crown and the representatives of the People returned in full force, and continued, with some short intervals of composedness, until the general election of 1705 again sent up a Whig majority to Parliament.[1]

Attempted revival of ancient authority of Privy Council by Act of Settlement.

It was during this interval of disunion between the Cabinet and the majority in Parliament, and while the possibility of still greater divergence, on the accession of a foreign dynasty, was present in men's minds, that an attempt was made at once to check the personal action of the King and to secure the responsibility of his Ministers by the provisions of the 4th clause of the Act of Settlement. That clause provided, as we have seen, that after the accession of the House of Hanover, all matters relating to the government of the kingdom which were cognisable in the Privy Council, should be transacted there, and be

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Mr. Skottowe, *Short Hist. of Parliament*, Lond. 1886, p. 136, thinks that it practically means 'executive union.' The members of the Whig Junto were Admiral Russell, 'the victor of La Hogue,' and in Green's view, *loc. cit.*, 'the most prominent'; Sir John Somers (Solicitor-General, 1689, Attorney-General, 1692, Lord Keeper, 1695, Lord Chancellor and created Lord Somers, 1697), 'an advocate who had sprung into fame by his defence of the Seven Bishops'; Thomas, 5th Lord Wharton, created Earl Wharton, 1706, and Marquis of Wharton, 1715, 'known as the most dexterous and unscrupulous of party managers'; and Charles Montagu, who was 'fast making a reputation as the ablest of English financiers', a reputation which Mr. Elliot, however, in his *Life of Sidney, Earl of Godolphin*, maintains ought in justice to be transferred to Godolphin. Montagu, who was a younger son of Hon. George Montagu, and grandson of Henry, 1st Earl of Manchester, was a Commissioner of the Treasury, 1692, and Chancellor of the Exchequer, 1694, and was created Baron Halifax, 1700, and Earl of Halifax, 1714. His praises were sung by Addison and Steele, while Pope returned upon him Montagu's own ridicule of Dryden's *Hind and Panther*. It should be noted that the term 'Junto' was again employed for the whole Ministry of the day in 1708.—ED.]

[1] Macaulay, Hist. Eng. [1861, ch. xxiv., v. 165].

authenticated by the signatures of such Privy Councillors as should advise and consent to the same. It was, however, soon perceived that this revival of the ancient authority of the Privy Council was an anachronism, and the clause was repealed, as already mentioned, early in Queen Anne's reign, before it could come into operation.

Queen Anne's dislike of party government.

Queen Anne, equally with William III., displayed a strong and persistent preference for a mixed Ministry, composed of the moderate men of each party. Her first Ministry, throughout almost its whole existence, was of this character, and the complete predominance of the Whig element which finally ensued was very distasteful to the Queen.[1] On the fall of Godolphin's Administration in 1710,[2] both she and Harley were anxious to avoid a Ministry entirely Tory, and vainly endeavoured to induce the Whig leaders to join in forming a Coalition Ministry, but with a preponderance of power in the hands of the Tories.[3] The general election of that year, which was greatly influenced by the exertions of the clergy, who had been roused to opposition by the trial of Sacheverell,[4] produced such a crushing defeat of the Whigs, that the Tory Ministry under

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[1] 'Her letters to Godolphin, when the accession of Sunderland to the ministry had become inevitable, express her sentiments on the subject in the strongest and clearest light. She urged that the appointment would be equivalent to throwing herself entirely into the hands of a party; that it was the object of her life to retain the faculty of appointing to her service honourable and useful men on either side; that if she placed the direction of affairs exclusively in the hands either of Whigs or Tories, she would be entirely their slave, the quiet of her life would be at an end, and her sovereignty would be no more than a name.' Lecky, Hist. of Eng. in the Eighteenth Century, i. 224; and see Coxe's Life of Marlborough, ch. 51, 52.

[2] [On Godolphin, in his home relations, see Evelyn's *Life of Mrs. Godolphin*, ed. by S. Wilberforce, D.D., Lond. 1848, and for recent views on his Political life, see *Life of Sidney, Earl of Godolphin, K.G.*, by Hon. Hugh Elliot, Lond., 1888, and *Edinburgh Review*, April, 1889, Art. *Sidney, Earl of Godolphin*, and review of the *Life*, by J. R. Tanner, in *Eng. Hist. Rev.*, Jan., 1890.—ED.]

[3] Lecky, Hist. of Eng. i. 225.

[4] [Mr. Minto, in his *Defoe, Eng. Men of Letters*, pp. 81–85, passes an unfavourable judgment on the Impeachment, of which he says, 'It would have been a wise thing for the Ministry to have left Sacheverell to be dealt with by their supporters in the press and in the pulpit.' Defoe recommended that he should be used 'as we do a hot horse', and in the *Review* he called for the punishment of the 'doctrines rather than the man.'—ED.]

Harley, now made Earl of Oxford, retained undisputed sway until the close of the Queen's reign (1714).

Final establishment of the Cabinet system under the first two Georges.

It was, however, under the first two Kings of the House of Hanover, the accession of whose dynasty was to have marked the extinction of the Cabinet system, that Parliamentary government by means of a Ministry—nominally the King's servants, but really an executive committee representing the will of the party majority for the time being in the House of Commons—was fully and finally established. This was due, in a great measure, to the personal character of George I. and George II., who, aliens in blood, in language, and in political sympathies, clung fondly to their beloved Hanover, and seemed to regard the Kingship of great Britain as an appendage, and rather an irksome appendage, to their small German Electorate.

'The troublesome energies of Parliament,' observes Sir Erskine May, 'were an enigma to them; and they cheerfully acquiesced in the ascendancy of able ministers who had suppressed and crushed pretenders to their crown—who had triumphed over parliamentary opposition, and had borne all the burthen of the Government. Left to the indulgence of their own personal tastes—occupied by frequent visits to the land of their birth, by a German court, favourites and mistresses—they were not anxious to engage more than was necessary in the turbulent contests of a constitutional government. Having lent their name and authority to competent ministers, they acted upon their advice, and aided them by all the means at the disposal of the Court.'[1]

Important effects of their indifference to English politics.

This indifference of the first two Georges to everything not affecting the interests of their Continental dominions had most important and beneficial effects. It allowed the English Constitution to develop freely under a kingship from which the element of personal Royal power was for the time practically eliminated. George III., who 'gloried in the name of Briton' without understanding in what it is that the glory of a Briton consists, strove hard

[1] May, Const. Hist. i. 7.

throughout his reign to recover the ground lost under his two immediate predecessors; but the system of Ministerial government with collective responsibility to the House of Commons was too firmly established to be overthrown, and is now regarded, though still unrecognised in the written Constitution, as a part of our polity almost as essential as the Parliament itself.

No conception of the English Constitution, in its existing theory and practice, can have any approach to accuracy which does not include a firm grasp of the complicated and delicate nature of the Cabinet system—that unique production of the silent working of the political forces of the Nation towards the equilibrium in which, by means of that system, they now repose.[1] Lord Macaulay was the first among our great historians to expound its true nature. 'The Ministry,' he tells us, 'is, in fact, a committee of leading members of the two Houses. It is nominated by the Crown; but it consists exclusively of statesmen whose opinions on the passing questions of the time agree, in the main, with the opinions of the majority of the House of Commons. Among the members of this committee are distributed the great departments of the administration. Each Minister conducts the ordinary business of his own office without reference to his colleagues. But the most important business of every office, and especially such business as is likely to be the subject of discussion in Parliament, is brought under the consideration of the whole Ministry. In Parliament the Ministers are bound to act as one man on all questions relating to the executive government.[2] If one of

Macaulay's description of the Ministerial system.

[1] [What was true at the time this work first saw the light, is not necessarily true now. The 'equilibrium' here described seems scarcely likely to be maintained in the present changed and still changing condition of political parties, and under an extended Franchise which, it is contended, must be still further extended, to reach the goal of 'one man, one vote,' and, if so, it is also contended, must logically be extended to 'one woman, one vote.'—ED.]

[2] [This picture represents an ideal not always in accordance with the facts, under modern administrations, the tendency of Ministers seeming to be towards a considerable and increasing latitude of expression, though such expression should be the open indication of differences of opinion among those charged with the Government.—ED.]

them dissents from the rest on a question too important to admit of compromise, it is his duty to retire. While the Ministers retain the confidence of the parliamentary majority, that majority supports them against opposition, and rejects every motion which reflects on them or is likely to embarrass them. If they forfeit that confidence, if the parliamentary majority is dissatisfied with the way in which patronage is distributed, with the way in which the prerogative of mercy is used, with the conduct of foreign affairs, with the conduct of a war, the remedy is simple. . . . They have merely to declare that they have ceased to trust the Ministry, and to ask for a ministry which they can trust.'[1]

'Ministry' and 'Cabinet' not synonymous.

The expressions 'the Ministry' and 'the Cabinet' are sometimes employed as though they were synonymous; but such a use of them is misleading. The term 'Ministry' properly includes all the Ministers, yet of these only a select number—usually about twelve, but liable to variation from time to time even in the same administration—constitute the inner council of the Crown, and incur the higher responsibilities, while they exercise the higher powers, of Government. The rest of the Ministry, although closely united with their brethren in the Cabinet, occupy a secondary and subordinate position.

Cabinet Council distinct from Privy Council.

Although, as we have seen, historically connected in its origin with the Privy Council, the Cabinet Council has now no connexion with that body, except that every member of it, if not already a Privy Councillor, is made one immediately on joining the Cabinet. But an essential characteristic of the Cabinet is that its members should combine in their persons the office of Minister of the Crown with that of membership of one of the Houses of Parliament, and more especially of that House which

Essential that Ministers should be members of the Legislature.

[1] Macaulay, Hist. Eng. ch. xx. [1861, iv. 437] 1866, iv. 44; and see Mr. Bagehot's 'English Constitution' for a spirited and able sketch of the Conventional or unwritten Constitution as contrasted both with the written or Legal Constitution and with the Presidential form of government in the United States of America.

though still conventionally termed the 'Lower House' is admittedly the 'greatest of the powers of the State.' The necessity for this rule has not however been unquestioned. 'A Cabinet which included persons not members of the legislative assembly might still,' says an eminent writer on the Constitution, 'perform all useful duties.'[1] But independently of the practical inconveniences which, as he admitted, would beset the work of government by a Cabinet so constituted, it would no longer be, what it now is, 'a committee of the two houses,' and would thus be disabled from performing its essential work as the regulator of the relations between the Crown, the House of Lords, and the Commons, and the means by which their theoretically conflicting powers are brought into practical harmony.[2] But although the rule which requires the Minister to be a member of the Legislature is now firmly established, so that any deliberate and persistent departure from it would be justly regarded as utterly unconstitutional, yet there is no law or legal usage to render it binding; and it has at least once within the last half century been disregarded, though then only temporarily and in an individual case.[3]

Secrecy of the Cabinet.

It is remarkable that a body wielding such vast powers as the Cabinet should hold all its deliberations and adopt all its decisions in absolute secrecy. No official record, or

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[1] Bagehot, Eng. Const. p. 13.

[2] The late Mr. Bagehot (Eng. Const. p. 14) defined the Cabinet as 'a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state. In its origin it belongs to the one, in its functions it belongs to the other.' But the Cabinet, he proceeds (p. 15), 'though it is a committee of the legislative assembly, is a committee with a power which no assembly would—unless for historical accidents, and after happy experience—have been persuaded to entrust to any committee. It is a committee which can dissolve the assembly which appointed it; it is a committee with a suspensive veto—a committee with a power of appeal. Though appointed by one Parliament, it can appeal if it chooses to the next. Theoretically, indeed, the power to dissolve Parliament is entrusted to the Sovereign only; and there are vestiges of doubt whether in *all* cases a Sovereign is bound to dissolve Parliament when the Cabinet asks him to do so. But neglecting such small and dubious exceptions, the Cabinet which was chosen by one House of Commons has an appeal to the next House of Commons.'

[3] Mr. Gladstone was a Secretary of State between December 1845 and July 1846, without, from accidental circumstances, possessing a seat in the House of Commons. But the occurrence excited some animadversion at the time.—Gleanings of Past Years, i. 225.

minute of any kind, is kept of its proceedings; and even a private note is disliked. Nor is any non-member even allowed to be present at its sittings, except on the rare occasions when some departmental official is summoned to impart special information. This peculiarity has been animadverted upon by Hallam as 'an apparent deficiency in our constitutional security,' on account of the difficulty of legally proving the participation of any one member (except the Lord Chancellor, who is responsible for setting the Great Seal to Treaties and other documents) in any measures deserving of impeachment.[1] It is indeed one of the many theoretical anomalies of the English Constitution, the delicate mechanism of which depends so largely for its efficient working upon the loyalty of the various depositaries of power. Should, however, this specific anomaly ever, unhappily, prove a practical difficulty, the vitality of the Constitution will doubtless be equal to devising a practical remedy.

The Premier.

The chief of the Cabinet is the Prime Minister or, as he is more commonly termed, the Premier. His position is not less peculiar or characteristic than that of the Cabinet itself. Officially, besides being a Privy Councillor, he is merely the First Lord of the Treasury, in which capacity he exercises, jointly with four others, the powers of the Lord High Treasurership, one of the great offices of the State which since the time of Harley has been thrown into commission. He has no legal primacy over the other members of the Cabinet, as is indeed necessarily the case in a body which has itself no legal status. In official precedence he ranks below many of the other Ministers.[2] He is selected by the Sovereign, whose choice among natural-born subjects, is legally unrestrained: but in fact, the choice of the Sovereign is limited to the one or two members of the predominant political party who can command a majority in the

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[1] Const. Hist. iii. 185.

[2] Unless he happen to combine the office of Lord Privy Seal with that of First Lord of the Treasury [as was the case with Lord Beaconsfield.—Ed.]

House of Commons. When charged by the Sovereign with the task of forming an Administration he proceeds to the selection of occupants for the various Ministerial offices, and submits their names for the approval of the Crown.[1]

Relations of the Cabinet to the Crown and to Parliament:

[1] The delicate relations of the Cabinet to the Crown on the one hand, and to the Houses of Parliament and the People on the other, as well as the internal relations of its members to one another and to the Premier, have not yet been touched upon. They are indeed topics upon which none but a Cabinet Minister is fully competent to speak. Fortunately we now possess an account of them, at once graphic and authentic, from the pen of a most distinguished modern Premier. 'The association,' says Mr. Gladstone, 'of the Ministers with the Parliament, and through the House of Commons with the People, is the counterpart of their association as Ministers with the Crown and the prerogative. The decisions that they take are taken under the competing pressure of a bias this way and a bias that way, and strictly represent what is termed in mechanics the composition of forces. Upon them, thus placed, it devolves to provide that the Houses of Parliament shall loyally counsel and serve the Crown, and that the Crown shall act strictly in accordance with its obligations to the nation. . . . In the face of the country the Sovereign and the Ministers are an absolute unity. The one may concede to the other; but the limit of concession by the Sovereign is at the point where he becomes willing to try the experiment of changing his Government: and the limit of concession by the Ministers is at the point where they become unwilling to bear, what in all circumstances they must bear while Ministers, the undivided responsibility of all that is done in the Crown's name. But it is not with the Sovereign only that the Ministry must be welded into identity. It has a relation to sustain to the House of Lords; which need not, however, be one of entire unity, for the House of Lords, though a great power in the State, and able to cause great embarrassment to an Administration, is not able by a vote to doom it to capital punishment. Only for fifteen years out of the last fifty [1878] has the Ministry of the day possessed the confidence of the House of Lords. On the confidence of the House of Commons it is immediately and vitally dependent. This confidence it must always possess, either absolutely from identity of political colour, or relatively and conditionally.'

to the House of Lords;

to the House of Commons.

Three-fold capacity of Cabinet Minister.

Leader of the House.

Of the members of the Cabinet, Mr. Gladstone proceeds, 'Every one of them acts in no less than three capacities: as administrator of a department of State; as member of a legislative chamber; and as a confidential adviser of the Crown. Two at least of them add to those three characters a fourth; for in each House of Parliament it is indispensable that one of the principal Ministers should be what is termed its Leader. This is an office the most indefinite of all, but not the least important. With very little of defined prerogative, the Leader suggests, and in a great degree fixes, the course of all principal matters of business, supervises and keeps in harmony the action of his colleagues, takes the initiative in matters of ceremonial procedure, and advises the House in every difficulty as it arises.

Internal relations of the Cabinet:

of each member,

(a) to the Cabinet as a whole;

'The nicest of all the adjustments involved in the working of the British Government is that which determines, without formally defining, the internal relations of the Cabinet. On the one hand, while each minister is an adviser of the Crown, the Cabinet is an unity, and none of its members can advise as an individual, without, or in opposition actual or presumed to, his colleagues. On the other hand, the business of the State is a hundred-fold too great in volume to allow of the actual passing of the whole under the view of the collected Ministry. It is therefore a prime office of discretion for each Minister to settle what are the departmental acts in which he can presume the concurrence of his colleagues, and in what more delicate, or weighty, or peculiar

Increased security of the Crown and of Ministers under the Cabinet system.

Not the least of the many advantages which have accrued from the establishment of the Cabinet form of Parliamentary government has been the increased security of the Crown and of its Ministers. The old Constitutional maxim that 'the King can do no wrong' is now literally true, for his acts are really the acts of his Ministers; and his Ministers are responsible to the House of Commons not merely as of old, for any breach of the law, but for the general course of their policy, which must accord with the opinions of the majority of that House, or else, in conformity with a Constitutional usage practically as binding as a legal enactment, the Ministers are bound to resign office. Instead of a revolution or a Parliamentary impeachment, a change of Ministry suffices to preserve harmony between the Crown and the people.

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cases, he must positively ascertain it. So much for the relation of each Minister to the Cabinet; but here we touch the point which involves another relation, perhaps the least known of all, his relation to its head.

(*b*) *to its head.*

'The head of the British Government is not a Grand Vizier. He has no powers, properly so called, over his colleagues: on the rare occasions, when a Cabinet determines its course by the votes of its members, his vote counts only as one of theirs. But they are appointed and dismissed by the Sovereign on his advice. In a perfectly organised administration, such for example as was that of Sir Robert Peel in 1841–6, nothing of great importance is matured, or would even be projected, in any department without his personal cognisance; and any weighty business would commonly go to him before being submitted to the Cabinet. He reports to the Sovereign its proceedings, and he also has many audiences of the august occupant of the Throne. He is bound, in these reports and audiences, not to counterwork the Cabinet; not to divide it; not to undermine the position of any of his colleagues in the royal favour. . . . As the Cabinet stands between the Sovereign and the Parliament, and is bound to be loyal to both, so he stands between his colleagues and the Sovereign, and is bound to be loyal to both.

'As a rule, the resignation of the First Minister, as if removing the bond of cohesion in the Cabinet, has the effect of dissolving it. A conspicuous instance of this was furnished by Sir Robert Peel in 1846: when the dissolution of the Administration, after it had carried the repeal of the Corn Laws, was understood to be due not so much to a united deliberation and decision as to his initiative. The resignation of any other minister only creates a vacancy. In certain circumstances, the balance of forces may be so delicate and susceptible that a single resignation will break up the Government; but what is the rule in the one case is the rare exception in the other. The Prime Minister has no title to override any one of his colleagues in anyone of the departments. So far as he governs them, unless it is done by trick, which is not to be supposed, he governs them by influence only. But upon the whole, nowhere in the wide world does so great a substance cast so small a shadow; nowhere is there a man who has so much power, with so little to show for it in the way of formal title or prerogative.'—'Kin beyond Sea,' pub. in 'North American Review,' Sept. 1878, repub. in 'Gleanings of Past Years,' i. 225, 226, 235, 241, 242–4.

Exclusion of placemen and pensioners from the House of Commons.

The sixth clause of the Act of Settlement, by which all placemen and pensioners were excluded from Parliament, was directly aimed, not at the Cabinet system, but at the dangerous influence which the Crown had acquired through the profuse distribution of offices and pensions among the members of the Legislature. This means of corrupting the representatives of the people had been extensively employed under the last two Stuarts; and William III., amidst the difficulties with which he found himself surrounded, adopted and even extended this baneful expedient for controlling his Parliaments. To check this abuse the Commons, in 1693, passed a Bill to prohibit all members thereafter elected from accepting any office under the Crown. Rejected by a small majority of the Lords, the bill was re-introduced in the following year and passed both Houses; but William III. refused the Royal assent. A few years later, however, the principle of disqualification received a Legislative sanction by the express exclusion from the House of Commons of the newly-appointed Commissioners of Stamps and Excise.[1] The total exclusion of all servants of the Crown from the House of Commons, enacted by the Act of Settlement, was not only far too drastic a remedy for the special evil which it was intended to meet, but would also, if carried into practice, have brought the Ministers of the Crown into hopeless conflict with the House of Commons, and, by preventing the fusion of the Legislative and Executive powers, have effectually stopped the development of the system of Parliamentary or Cabinet government which we now enjoy. The clause was, however, as we have seen, repealed before it could come into operation, in the fourth year of Queen Anne's reign;[2] and two years afterwards, by the 'Act for the Security of the Crown and Succession,'[3] more reasonable provisions were enacted for the prevention of corrupt in-

[1] 4 & 5 Will. & Mary, c. 21 (Stamps); 11 & 12 Will. III. c. 2, s. 50 (Excise).
[2] 4 Anne, c. 8, s. 25.
[3] 6 Anne, c. 7.

fluence. (1) Every person holding 'any office or place of profit whatsoever under the Crown' created since the 25th of October, 1705, or in receipt of a pension during the pleasure of the Crown, was incapacitated from sitting in the House of Commons; and (2) every member of that House accepting any of the previously existing offices under the Crown (except a higher commission in the army) was obliged to vacate his seat, though still eligible for re-election.[1] So long as the system of Ministerial government, with responsibility to the House of Commons, was not fully established, and while the House of Commons itself remained liable to corrupt influences, and, under a restricted franchise, failed to represent the people, such a provision as the latter, which compelled the acceptance of office by a representative to be submitted to the approval of his constituents, acted as a salutary check both upon the Crown and the leading members of the Commons. But now, with a reformed suffrage, and under a customary or unwritten Constitution in which one of the principal functions of the members of the Commons is, by an indirect process, to choose the Ministers of the Crown, the reasons for the enactment have ceased to exist. Although, however, several attempts have been made to modify the principle, they have been always unsuccessful, with the single exception contained in the Reform Act of 1867, dispensing with the requirement of 6 Anne, c. 7, in the case of the removal of a Minister from one office under the Crown to another.[2]

The exception from the Act of 6 Anne, c. 7, of all offices existing on the 25th October, 1705, enabled the Crown still to exercise extensive corruption by means of places; and in 1741 no less than two hundred appointments were held by members of the House of Commons.[3] In the following

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[1] 6 Anne, c. 7. To check the increase of placemen, certain restrictions were also imposed on the multiplication of commissioners.

[2] 30 & 31 Vict. c. 102, s. 52.

[3] Lords' Protests, 1741.

The 'Place Bill' of 1742.

year, however, the Place Bill,[1] which had been thrice rejected by the Commons and twice by the Lords, passed into an Act, excluding from the House a large number of officials, chiefly clerks and other subordinate officers of the public departments. In 1782 several other offices which had been generally held by members of Parliament were suppressed by Lord Rockingham's Civil List Act;[2] and the policy of official disfranchisement has been since almost invariably followed whenever new officers have been appointed by Acts of Parliament.

Lord Rockingham's Civil List Act, 1782.

Secret pensions.

The incapacity imposed by the Act 6 Anne, c. 7, upon pensioners of the Crown during pleasure, though extended at the commencement of the next reign to pensioners for terms of years,[3] was eluded by the grant of secret pensions out of the large sum annually voted to the Crown as 'secret service money,' and expended without any account; but by Lord Rockingham's Act already referred to, the power of granting pensions out of the King's Civil List was considerably limited, and secret pensions were abolished by a provision that in future all pensions should be paid at the public Exchequer. In the same year a stop was put to another form of Parliamentary corruption by an Act disqualifying contractors for the public service from sitting in the House.[4]

Exclusion of Judges from House of Commons.

The Common Law Judges had always been disqualified from sitting in the House of Commons; and this exclusion was extended to the Scotch Judges under George II., and

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[1] 15 Geo. II. c. 22.

[2] 22 Geo. III. c. 82.

[3] 1 Geo. I. c. 56.

[4] 22 Geo. III. c. 45. The Irish Parliament, in 1793, applied the principle of the English Act of Anne to its own members by disqualifying all holders of offices under the Crown or Lord Lieutenant created after that time. This disqualification was extended, at the Union, to the Parliament of the United Kingdom; and at the same time several new disqualifications in respect of Irish offices were added (41 Geo. III. c. 52).

In the first Parliament of Geo. I. there were 271 members holding offices, pensions, and sinecures. In the first Parliament of George II., 257; in the first Parliament of George IV. but 89, exclusive of officers in the Army and Navy; and in 1833 there were only 60 members holding civil offices and pensions, and 83 holding naval and military commissions. On Places and Pensions in the House of Commons, see May, Const. Hist. i. pp. 369-375.

to the Irish Judges under George IV. The same rule was applied in 1840 to the Judge of the Court of Admiralty; and the holders of all newly-created Judicial posts have been disqualified by the Acts under which they were constituted. The Master of the Rolls—hitherto the sole Judge who had retained the capacity of sitting in the Commons—has been also at length disqualified by the clause of the Supreme Court of Judicature Act, 1873, which declares that no Judge of the High Court of Justice or of the Court of Appeal shall be capable of being elected to or of sitting in that House.[1]

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[1] 36 & 37 Vict. c. 66, s. 9.

[The general position of affairs in regard to Constitutional questions since the Revolution is thus tersely summed up by M. Glasson, *Hist. du Dr. et des Inst. Pol. de l'Angl.* v. 404–5. 'La révolution de 1688 inaugure définitivement le régime parlementaire en Angleterre. La royauté est plus que jamais limitée dans sa prérogative. L'habile prince d'Orange . . . s'attacha à user l'un contre l'autre les deux grands partis qui se disputaient le pouvoir dans le Parlement. . . . La reine Anne, douée, comme son père, d'un esprit étroit et borné, . . ne parvint à exercer aucune influence sur le Parlement. George Ier était, en tous points, un prince allemand du dix-huitième siècle, . . infatué de son importance princière, incapable de prononcer un mot d'Anglais, ignorant l'esprit du peuple sur lequel il devait régner. Il eut cependant l'habileté de comprendre combien sa situation était délicate. . . George II. se trouva au commencement de son règne dans une situation pire encore que celle de son père. . . . C'est seulement sous George III. . . . que la royauté se relève sérieusement.' Interesting particulars throwing light on modern views of Ministerial government may be found in the *Edinburgh Review*, for Jan., 1890, Art. *Life of Lord John Russell*, and in Mr. Spencer Walpole's *Life*, of which it is a criticism, as well as in Mr. Walpole's *History of Europe since* 1815, Lond. 1878–86. The fact of the growth of a 'genuine Legislative Authority' in this country, 'in opposition to the Executive, still represented by the monarch,' was emphasised by the late Prof. Sheldon Amos, in his *Science of Politics*, Lond. 1883, p. 91, as 'a world-wide phenomenon simply made more conspicuous in England by the slow, steady, and uninterrupted manifestation of every one of the links in the chain of development. In other countries the process has only been accomplished after hundreds of years of political stagnation, or after periods of anarchy or after the social chaos produced by religious corruption.'—ED.]

CHAPTER XVII.

PROGRESS OF THE CONSTITUTION SINCE THE REVOLUTION (CONTINUED).

IN the preceding chapter we have discussed the Act of Settlement and the various topics arising out of its provisions, including that most important topic of all—the growth and present working of the Cabinet system. Much more remains to be said on the progress of the Constitution since the Revolution; and with a view as well to clearness of exposition as to conciseness of statement the chief remaining Constitutional facts may be conveniently grouped under the five heads of (1) the Kingship, (2) the House of Lords, (3) the House of Commons, (4) Religious Liberty, and (5) the Liberty of the Press.

I. Kingship since the Revolution.

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The legal prerogatives of the Crown were untouched by the Revolution settlement. It was only the recent innovations which were swept away, leaving to the Kingship the legal character which it had possessed prior to the usurpations of the Tudors and Stuarts. By the written Constitution the King still retains the supreme Executive and co-ordinate Legislative power. He calls Parliament together, prorogues or dissolves it at pleasure, and may refuse the Royal assent to any Bills. He is the 'Fountain of Justice,' and as such dispenses Royal justice through Judges appointed to preside, in his name, over the various Courts of Judicature. As supreme Magistrate and conservator of the peace he nominally prosecutes criminals, and may

Legal prerogatives of the Crown untouched at the Revolution,

pardon them after conviction. As supreme Military commander, he has the sole power of raising, regulating, and disbanding armies and fleets. As the 'Fountain of Honour,' he alone can create Peers (a power of the highest Constitutional importance) and confer titles, dignities and offices of all kinds. He is the legal head and supreme governor of the National Church, and in that capacity convenes, prorogues, regulates, and dissolves all Ecclesiastical Synods or Convocations.[1] As the representative of the majesty of the State in its relations with Foreign Powers, he has the sole power of sending and receiving Ambassadors, of contracting Treaties and alliances, and of making War and Peace.[2]

But in practice these vast prerogatives have now long been exercised not at the will of the Sovereign, but of the responsible Ministers of the Crown, who represent the will

but now practically vested in its responsible Ministers.

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[1] On the early history of Convocation and its relations to the King and Parliament something has been said *supra*, p. 262, *Ib. n.* 3. From the passing of the Act 25 Hen. VIII. c. 19 (*supra*, p. 443), Convocation has ceased to possess any independent Legislative power, Church and State being alike subjected to the supreme power of Parliament. Under Elizabeth it was occasionally consulted on questions affecting the national religion, and it confirmed, in 1562–3, the XXXIX Articles. By the King's licence Convocation established certain Canons in 1604 (which, however, not having been confirmed by Parliament, are not binding on the laity); and attempted to make further regulations in 1640 (*supra*, pp. 510, 600); but from the year 1664, when the practice of ecclesiastical taxation was discontinued, even discussions in Convocation practically ceased. About the time of the Revolution attempts were made to resuscitate the action of Convocation, more especially by Atterbury (afterwards Bishop of Rochester), who published a book entitled 'The Rights and Privileges of an English Convocation.' In 1717, the religious ferment excited by the Bangorian controversy (arising out of the denunciation by the Lower House of Convocation of a sermon in favour of religious liberty preached by Hoadley, Bishop of Bangor,) induced the Ministers of George I. to suddenly prorogue the would-be ecclesiastical Parliament. From this time Convocation, though regularly summoned, was for more than a century as regularly prorogued immediately after it had assembled. In 1850 it was again allowed to resume the discussion of Church matters; and in 1861 was empowered by Royal licence to alter the 29th Canon of 160[4], which prohibited parents from acting as sponsors to their children; but it was specially provided in the licence that no alterations should be of any validity until confirmed by letters patent under the Great Seal. In 1872, letters of business were issued by the Crown empowering Convocation to frame resolutions on the subject of public worship, and these were afterwards incorporated in an Act of Parliament (Act of Uniformity Amendment Act, 35 & 36 Vict. c. 35). See Hallam, Const. Hist. iii. 242–247; Stephen, Commentaries [5th ed.], ii. 544–546. [On Convocation, cf. also *post*, *App.* C.—ED.]

Convocation:

Suspended, 1717.

Resumed, 1850.

[2] See Stephen, Comm. 5th ed. ii. 473–547; and for [Treaty-making Power, cf. *Law Magazine and Review*, May, 1879, Art. by Sir Travers Twiss, Q.C.—ED.

of the majority in the House of Commons. 'In outer seeming,' it has been well observed, 'the Revolution of 1688 had only transferred the sovereignty over England from James to William and Mary. In actual fact, it was transferring the sovereignty from the King to the House of Commons. From the moment when its sole right to tax the nation was established by the Bill of Rights, and when its own resolve settled the practice of granting none but annual supplies to the Crown, the House of Commons became the supreme power in the State. It was impossible permanently to suspend its sittings, or, in the long run, to oppose its will, when either course must end in leaving the Government penniless, in breaking up the army and navy, and in rendering the public service impossible.'[1]

Personal influence of the Sovereign.

The mode in which the Executive power of the Crown has gradually been transferred to what has been aptly termed 'a board of control chosen by the legislature to rule the nation,'[2] has been already sketched in treating of the growth of the Cabinet. But though greatly weakened at the Revolution, the personal influence of the Sovereign over the administration of affairs long continued to be openly exercised, and is still potent, to an extent which can be known only to the parties themselves, in the confidential intercourse of Ministers with the head of the State.[3]

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[1] J. R. Green, Short History of the English People, p. 680.

[2] Bagehot, Eng. Const. p. 13.

[3] 'There is not a doubt that the aggregate of direct influence normally exercised by the Sovereign upon the counsels and proceedings of her Ministers is considerable in amount, tends to permanence and solidity of action, and confers much benefit on the country, without in the smallest degree relieving the advisers of the Crown from their undivided responsibility.' . . . 'It is a moral, not a coercive influence. It operates through the will and reason of the Ministry, not over or against them. It would be an evil and a perilous day for the Monarchy were any prospective possessor of the Crown to assume or claim for himself final, or preponderating, or even independent power, in any one department of the State.' Gladstone, Gleanings of Past Years, i. 42, 233. [In a communication to the author on the subject of a suggested obscurity in the last paragraph, Mr. Gladstone explained the sequence of epithets as follows: 'What I mean by "independent" is separate; whereas the "final" and the "preponderating" are assumed to be exercised, so to speak, within the partnership. Such a separate action of the Sovereign could under the rules of our Constitution only be in minor and secondary forms; for this reason I treat it as the least of the three. Separate might be a better word than independent.']

Causes which tended to induce its decline.

Several general causes tended to bring about a decline in the personal influence of the Sovereign subsequent to the Revolution. Foremost among these may be placed the disputed succession to the Crown. The Hanoverian succession was in very serious danger at the death of Queen Anne; and the continuing power of Jacobite intrigues was evidenced by the Rebellions of 1715 and 1745. The Divine Right of kings, though permanently negatived at the Revolution, still continued for a time to be inculcated by the Tory party, and by the great majority of the clergy, who taught the duty of Passive Obedience and the sinfulness of rebellion. But with the accession of the House of Hanover, the doctrine of Divine Right became attributable, in the minds of those who believed in it, not to the King *de facto* but to the heir of the Stuarts. Moreover, George I., from the necessity of the case, placed himself in the hands of the Whig party, who had secured his accession to the throne; and the Tories, influenced alike by party opposition and by personal objection to the new dynasty, found themselves in the somewhat unnatural position of opponents to the Royal prerogative.[1] And while on the one

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[1] [This opposition, into which the Tory party of the day was forced during the earlier part of the last century, however 'unnatural' it may have been or seemed to be, probably aided materially in the development of Constitutional views, and thus may justify Mr. T. E. Kebbel's seemingly somewhat paradoxical statement, in the *Cornhill Magazine*, vol. xxxviii., 1878, Art. *The Eighteenth Century*, p. 541, to the effect that 'In the eighteenth century constitutional government was established, and the British Empire was created.' According to Mr. Kebbel, 'what really gave life and meaning to the Parliamentary opposition of those days, was that old antagonism between land and trade which was the growth of the Revolution, and of which the ridiculous side is shown us in Addison's *Freeholder*, and the more reasonable one in Shelburne's *Autobiography*.' *Ib.* p. 542. Mr. Kebbel subsequently says, that 'the country gentlemen, then the really independent party . . . held that the new Parliamentary system was not constitutional,' and that Lord Shelburne constantly speaks of it as a 'sham,' and, p. 543, cites Lord Shelburne's *Autobiography* to the following effect:—'During the first twenty years of the reign of George II. there were three parties: firstly, the old Whigs, who entirely composed the administration; secondly, the discontented Whigs, who, one after another, quarrelled with Sir Robert Walpole and the main body; thirdly, the Tories, to whose character and principles sufficient justice has not been done, owing to the never-ceasing outcry of ministers in confounding them with the Jacobites; but, in fact, they were the landed interest of England, who desired to see an honourable, dignified government, conducted with order and due economy and due subordination, in opposition to the Whigs, who courted the mob in the

hand the personal influence of the Sovereign was opposed by the Tories, both on account of his lack of hereditary right, and of his alliance with their political foes, that influence itself was rapidly diminished by the increased development of the system of Party government working by means of the Cabinet system.[1]

One very important factor in the declension of the Sovereign's personal influence was his abstention, since the death of Queen Anne, from presiding at Cabinet Councils. In early times the King had been accustomed to preside in person at the Council board, and necessarily exercised an immense influence upon its determinations. Abandoned about the close of the 14th century, this practice was revived by the Tudor and Stuart monarchs, and was maintained, after the Revolution, by William III. and by Anne. William III., a man of consummate political ability, was, indeed, his own Prime Minister, his own Foreign Minister, and his own Commander-in-Chief. Queen Anne not only regularly presided at Cabinet Councils, but occasionally attended debates in the House of Lords. It was only at the accession of George I. that the King's ignorance of the English language and his indifference to English politics caused the introduction of the practice of Cabinet Councils being held, as in the ante-Tudor times Privy Councils had been held, without the presence of the Sovereign. This practice—so essential to the free development of Parliamentary government[2]—has ever since been

Reaches its lowest point under George I. and George II.

first instance, and in the next the commercial interest.' And 'these,' Mr. Kebbel urges, 'were the real principles of opposition. The Whigs had exalted the trading interest at the expense of the land, and by setting up a sham monarchy instead of a real one, had violated the spirit of the constitution.' It is difficult to see, however, that the present monarchy is more 'real' than that of the Georgian era, in Mr. Kebbel's sense of the term.—ED.]

[1] See Lecky, Hist. of Eng. i. 217–227.

[2] 'The presence of the King at the Cabinet either means personal government—that is to say, the reservation to him of all final decisions which he may think fit to appropriate—or else the forfeiture of dignity by his entering upon equal terms into the arena of general, searching, and sometimes warm discussion: nay, and even outvoting too, and of being outvoted, for in Cabinets, and even in the Cabinets reputed best, important questions have sometimes been found to admit of no other form of decision.' Gladstone, Gleanings of Pas Years, i. 85.

maintained, and on the principle *optimus interpres usus* may now be regarded as having ripened into a fixed rule of the Constitution. It is remarkable, however, that like some other important features of our Political Institutions, such as the division of the Legislative assembly into two instead of three Houses,[1] the disappearance of the Sovereign from the meetings of the Cabinet should be due not to deliberate design but to a happy accident.

It is to the credit of George II.—narrow-minded and ignorant as he was—that throughout his long reign of thirty-three years he discharged the duties of a Constitutional King with honourable fidelity, loyally supporting the Ministers to whom he had given his confidence, even at the expense of his own predilections.[2] But it was not without an inward struggle that he did so. 'Ministers are the King in this country,' he once bitterly exclaimed;[3] and relying upon his legal right to choose his own Ministers, he occasionally opposed the accession to office of persons whom he disliked. William Pitt, the 'Great Commoner,' was an especial object of his antipathy, having made himself personally offensive to the King by his somewhat intemperate attacks upon the Sovereign's Hanoverian partialities.[4] But when the King finally yielded, he honestly gave his new Minister a hearty support. 'Sire,' said Pitt, shortly after accepting office, 'give me your confidence and I will deserve it.' 'Deserve my confidence,' was the King's reply, 'and you shall have it.' And the promise was faithfully kept.[5]

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[1] *Supra*, p. 274, *Ib. n.* 1.

[2] [That George II. continued Walpole in office though known to have hated him 'hardly less than he had hated his father,' is attributed by Green, *Hist. Eng. People*, iv. 142, to his being 'absolutely guided by the adroitness of his wife, Caroline of Anspach,' who had 'resolved that there should be no change in the Ministry.' Eventually, as Green says, Walpole gained as great an influence over George II. as he had gained over his father.—ED.]

[3] Lord Mahon, Hist. of Eng. iii. 280.

[4] In a debate, in Dec. 1743, on a motion for defraying the cost of 16,000 Hanoverian troops, Pitt affirmed: 'it is now too apparent that this great, this powerful, this formidable kingdom is considered only as a province to a despicable Electorate, and that in consequence of a scheme formed long ago and invariably pursued, these troops are hired only to drain this unhappy nation of its money.' Lord Mahon, Hist. of Eng. iii. 207.

[5] Lecky, Hist. of Eng. ii. 466.

Long struggle of George III against the Ministerial system.

But though firmly, and, as the event has shown, permanently, established under the first two Georges, the system of Parliamentary government had to undergo a severe struggle for existence throughout the reign of George III., who, not content with reigning, was determined also to govern.

Character of the King.

George III. was a young man of only twenty-two years of age when called to the throne by the sudden death of his grandfather. His education had been sadly mismanaged, so that his 'book-learning,' to quote the words of his mother, the Princess of Wales, was 'small or useless.'[1] And limited as was the range of his reading, his capacity to appreciate such authors as he had read was more limited still. 'Was there ever such stuff,' he exclaimed to Miss Burney, 'as great part of Shakespeare? only one must not say so!'[2] But in one subject, the estimation of his own rights and authority as Sovereign, he had been only too well taught. From his tutor, Lord Bute, and from his mother—'whose ambition yielded to none,'[3]—he had imbibed the most exalted notions of his Royal dignity. 'George, be King!' was the lesson which she sedulously instilled into his willing ear,[4] and he grew up, as Lord Waldegrave, one of his governors, wrote in his private memoirs, 'uncommonly full of princely prejudices contracted in the nursery, and improved by bedchamber-women and pages of the back-stair.'[5] Yet he was a virtuous and honourable man, irreproachable as a son, a husband, and a father, frugal in his expenditure, shrewd and assiduous, but not always sagacious, in all the business of the State. Benjamin Franklin said of him that he could 'scarcely conceive a King of better dispositions, of more exemplary virtues, or more truly desirous of promoting the welfare of his subjects.' But the excellence of his

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[1] Bubb Doddington's Diary, 357.
[2] Diary and Letters of Madme D'Arblay, 19 Dec. 1785. (ii. 398.)
[3] H. Walpole, Mem. of Reign of Geo. III. i. 11.
[4] Earl of Albemarle's Rockingham Memoirs, i. 3.
[5] Lord Waldegrave's Memoirs, i. 9. [On George III. generally, cf. *Gent. Mag.*, April, 1867, Art. *When George III. was King*.—ED.]

character, and the patriotism of his motives, serve only to emphasise the lesson which the events of his reign have written large for the benefit of all his successors on the throne. He was determined, from the very outset, to re-assert the Personal power of the Sovereign, which had almost disappeared from the sphere of government since the accession of the House of Hanover, and to rule freed from the trammels of Ministers and parties, for the people, indeed, but not by them. The very characteristics which, in a private station, would have been accounted to him as merits, rendered him so much the less fitted for the position of a Constitutional King. During the first twenty-four years of his reign, by his meddlesome energy and restless activity in regulating every affair of State from the greatest to the least, combined with a resolute obstinacy in enforcing his own views against the opinion of his Constitutional advisers, he succeeded in alienating the affections of his people, in reducing the nation from prosperity to the depths of adversity, and in depriving the country for ever of its American Colonies. Later on, his conscientious but absurd scruples as to his coronation oath, postponed, until the boon had lost much of its political efficacy, the just and statesmanlike measure of Roman Catholic Emancipation, which the younger Pitt had designed as a means of consolidating the United Kingdom. The naval and military glories of the latter half of his reign, the popularity of Pitt, whom both the King and the people trusted, and the melancholy illness of the Sovereign, which at once enlisted the sympathies of the nation on his behalf and gave greater independence of action to his Ministers, turned the current of popular opinion in his favour; and when he died, after years passed in mental and visual darkness, none but kindly thoughts followed the 'good old king' to his grave.

The King's secret counsellors,

In pursuance of his settled resolve to wrest all power from the hands of his ministers and to exercise it himself, George began his reign by calling to his aid a cabal of secret counsellors, with the Earl of Bute,—a peer of Scot-

land, formerly his tutor, and at that time his Groom of the Stole,—at their head. These were mainly composed of Tories whose Jacobite tendencies had hitherto kept them apart from public affairs, but who now, having 'abjured their ancient master, but retained their principles,'[1] brought to the service of the new Sovereign the reverential sentiments which had distinguished the adherents of the Stuarts. Supported by these 'King's friends' and their followers in the House of Commons, the King endeavoured to govern independently of both Parliament and people, thwarted and opposed his Ministers, and distributed at his own will the vast amount of ecclesiastical, military, and civil patronage which, during the reigns of his two immediate predecessors, had been practically at the disposal of the Cabinet.

known as the 'King's Friends.'

Premiership of Lord Bute, 1762.

On the second day after his accession (25 Oct. 1760), the King had caused Lord Bute to be sworn of the Privy Council, and admitted into the Cabinet. The existing Ministry, which had been formed in June, 1757, by a coalition of the Duke of Newcastle with the elder Pitt, were indeed retained in office, but Bute was the real adviser of the King, and held himself forth as the sole expounder of the Royal will and opinions.[2] Within five months (25 March, 1761) he was gazetted a Secretary of State; within thirteen,—having in the meantime got rid of Pitt, Newcastle, and the other Ministers who declined to retain responsibility without power—the Favourite attained the object of his ambition in May, 1762, as Prime Minister. A few days afterwards he obtained for himself the Order of the Garter. Such a rapid rise would have excited envy even in the case of a very able man; but Lord Bute was below

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[1] Walpole, Mem. i. 15, cited by May, Const. Hist. i. 13.

[2] Lord Mahon, Hist. of Eng. iv. 322. 'Great pains were taken to give an idea of the King's firmness as characteristic of the new reign; and it was sedulously whispered by the creatures of the Favourite and the Mother, that it was the plan to retain all the late King's Ministers, but that his Majesty would not be governed by them, as his grandfather had been.' H. Walpole, Mem. of Reign of George III. i. 8.

mediocrity. By means of wholesale bribery of the House of Commons,[1] he succeeded, with doubtful wisdom and in spite of the public wishes, in putting an end to the Seven Years' War, by the Peace of Paris (Feb. 10, 1763). But his intense unpopularity both within and without Parliament soon rendered his position as Minister untenable; and afraid, as he himself declared, 'not only of falling himself, but of involving his royal master in his ruin,' he suddenly resigned on the 7th of April, 1763,—only, however, to retire to the interior cabinet, whence he hoped to direct more securely the measures of the new Ministry which, under the presidency of Mr. George Grenville, the King had appointed, at the recommendation of his favourite. But the new Premier was by no means contented to be the mere agent of Lord Bute, and the King ultimately found himself bound to dismiss the favourite from court, and to promise that he should not be suffered to interfere in the Royal councils 'in any manner or shape whatever.'

His sudden fall.

His continued secret influence under the Grenville ministry.

His ultimate dismissal from Court.

During the Bute and Grenville ministries, George III. entered on a course of arbitrary conduct which approached as nearly to the character of the Stuart government as the difference of circumstances would allow. The Duke of Devonshire—'the Prince of the Whigs,' as the King's mother sarcastically termed him—having declined to attend the Council summoned to decide upon the peace with France—a measure highly unpopular with the nation—was insulted by the King, forced to resign his office of Lord Chamberlain, and was struck out of the list of Privy councillors, by the King's own hand. For presuming, as peers of Parliament, to express disapprobation of the Peace, the Dukes of Newcastle and Grafton and the Marquis of Rockingham were dismissed from the Lord-

Arbitrary measures of the King during the Bute and Grenville ministries.

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[1] [This was, unfortunately, no novelty. The Whigs, says Green, *Hist. Eng. People*, iv. 217, had 'managed' the House 'by bribery and borough-jobbing, and George in his turn seized bribery and borough-jobbing as a base of the power he proposed to give the Crown.' But at this date, as Green notes, *loc. cit.*, the House of Commons 'had ceased in any real and effective sense to be a representative body at all.'—ED.]

Lieutenancies of their several counties, and the Duke of Devonshire, to avoid a similar affront, found it necessary to resign. Earl Temple was also dismissed from the Lord-Lieutenancy, and struck off the list of Privy Councillors on account of his friendship for John Wilkes, whose journal, the *North Briton*, had excited the anger of the Court by denouncing the Peace and the Ministry with unexampled boldness and bitterness. For their votes in Parliament, General Conway, a brave soldier and honourable politician, was dismissed from his civil and military commissions, Colonel Barré and Colonel À Court were deprived of their military commands, and Lord Shelburne of his office of Aide-de-camp to the King. Mr. Fitzherbert was removed from the Board of Trade, Mr. Calcraft from the office of deputy muster-master. All Parliamentary placemen who failed to vote in accordance with the King's wishes were summarily dismissed, and even clerks in public offices and other small officials shared the fate of the patrons by whom they had been appointed.[1] 'To commit General Conway or Colonel Barré to prison,' remarks Sir Erskine May, 'as James I. had committed Sir Edwin Sandys, and as Charles I. had committed Selden and other leading members of the House of Commons, could not now have been attempted. Nor was the ill-omened adventure of Charles I. against the Five Members likely to be repeated; but the King was violating the same principles of constitutional government as his arbitrary predecessors. He punished, as far as he was able, those who had incurred his displeasure, for their conduct in Parliament; and denied them the protection which they claimed from privilege and the laws of the country.'[2]

The Rockingham ministry, 1765.

The King's 'policy of proscription' was soon, however, destined, for a time at least, to very ignominious failure. Very shortly after Mr. Grenville's appointment to the Premiership, differences sprang up between him and the

[1] Lord Mahon, Hist. of Eng. v. 23, 33, 53.
[2] May, Const. Hist. i. 30.

King. He had been intended by Lord Bute and the King to be merely the agent for carrying out their wishes; but although as narrow-minded and imperious in his political views as the King himself, he was also equally confident in his own abilities, equally fond of power, and equally unbending in maintaining what he conceived to be his rights. Twice did the King open negotiations with Pitt for the formation of a new Ministry, but on each occasion without success. Though willing to receive Pitt, he could not bring himself to accept those other 'ministers of the late reign who had attempted to fetter and enslave him,' whom Pitt demanded as colleagues, but whom the King had declared he would 'never upon any account suffer to come into his service while he lived to hold the sceptre.'[1] At length in 1765, utterly wearied of the Grenville ministry, and determined at any cost to be rid of them, he found himself (July 13th) reduced to the necessity of accepting as Premier the Whig Marquis of Rockingham,[2] whom he had so recently removed from his Lord-Lieutenancy; while General Conway, who had been dismissed from an office in the King's household and from the command of his regiment, became Secretary of State and Ministerial leader of the House of Commons. But though forced by circumstances to place in office men whom he detested, George III. was still determined to have his own way. He now adopted a different system of tactics. Having, in 1766, vainly resisted in Council the proposal of his Ministers to repeal the Stamp Act, which they deemed absolutely necessary for the conciliation of the American colonies, he opposed them in Parliament by means of an organised opposition of the 'King's friends,' made up not only of independent members of the Court party, but of office-holders under the Crown, who were encouraged by the King to oppose his

Organised opposition in Parliament by the 'King's friends' to the repeal of the Stamp Act in 1766.

[1] Bedford Correspondence, iii. 224.

[2] [Green, *Hist. Eng. People*, iv. 232, says of Rockingham, that he was 'honest of purpose, . . . inclined to a pure and lofty view of the nature and end of government, . . . but he was young, timid, and of small abilities.'—ED.]

Ministers, and were retained and protected in their offices while voting with the Opposition.

Ministry of Grafton and Pitt, 1766.

After twelve months' tenure of office, Rockingham was dismissed by the King (July 1776); and Pitt, who was now raised to the Upper House as Earl of Chatham, was prevailed upon to form an Administration on non-party lines, with the Duke of Grafton as Premier, he himself taking only the unimportant post of Lord Privy Seal. The second ministry of Pitt was, however, anything but a success. The 'Great Commoner' lost his popularity by the acceptance of a peerage, and the mysterious and melancholy illness by which he was shortly prostrated, soon prevented him from taking any active part in the Administration, from which he retired in Oct. 1768, leaving it to be carried on by the Duke of Grafton amidst ever-increasing difficulties.

At length in 1770, the Grafton Ministry resigned; and the Whig party being divided into two sections, composed of the respective followers of Rockingham and Chatham, the King adroitly seized the opportunity of their disunion to make Lord North—a Tory, although Chancellor of the Exchequer in the late Administration—his Prime Minister.

Influence of the King attains its maximum during Lord North's Ministry, 1770–82.

It was during Lord North's Administration, which lasted for twelve years (1770 to 1782), that the Personal influence of the King attained its highest pitch. 'Not only,' we are told, 'did he direct the minister in all important matters of foreign and domestic policy, but he instructed him as to the management of debates in Parliament, suggested what motions should be made or opposed, and how measures should be carried. He reserved for himself all the patronage; he arranged the whole cast of the administration; settled the relative place and pensions of ministers of state, law officers, and members of the household; nominated and promoted the English and Scotch judges; appointed and translated bishops and deans; and dispensed other preferments in the Church. He disposed of military governments, regiments, and commissions, and

himself ordered the marching of troops. He gave and refused titles, honours, and pensions.'[1] He was, in fact, as declared by Mr. Fox in the House of Commons, 'his own unadvised minister,' Lord North submitting to be the mere mouthpiece of his Royal master, and continuing to carry on the American war, although, as he informed the King in 1779, 'he held in his heart, and had held for three years past,' the opinion that its continuance 'must end in ruin to his Majesty and the country.'[2]

To enforce his system of Personal government the King professed himself ready to adopt the most extreme measures. In 1770, when Lord Chatham was about to move an address for dissolving Parliament, the King, in a conversation with General Conway, said, laying his hand upon his sword, 'I will have recourse to *this* sooner than yield to a dissolution.'[3] He several times threatened to abdicate and retire to Hanover rather than accept Ministers or measures of which he disapproved; a threat which was on one occasion met by the significant remark of Lord Thurlow, 'Your Majesty may go; nothing is more easy; but you may not find it so easy to return when your Majesty becomes tired of staying there.'[4]

The *Royal veto.*

Since the accession of the House of Hanover, no Sovereign of this country has exercised the prerogative of refusing the Royal assent to a Bill which has passed both Houses,[5] but it is not surprising to find that George III. was prepared to do so. 'I hope,' he wrote to Lord North, in 1774, 'the Crown will always be able, in either House of Parliament to throw out a bill; but I shall never consent to use any expression which tends to establish

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[1] May, Const. Hist. i. 58; Corr. of Geo. III. with Lord North, *passim*, and Wraxall's Mem. ii. 148.

[2] Correspondence of Geo. III. with Lord North, 1768–1783 (ed. Donne).

[3] Rockingham, Mem. ii. 179.

[4] May, Const. Hist. i. 64.

[5] The last occasions on which the prerogative of rejecting Bills was exerted were in 1692 and 1694, when William III. refused the Royal assent to the Bill for Triennial Parliaments and the Place Bill, and in 1707, when Queen Anne rejected a Scotch Militia Bill.

that at no time the right of the Crown to dissent is to be used.'[1]

Mr. Dunning's Resolutions on the influence of the Crown, 1780.

At length, in 1780, Mr. Dunning proposed and carried in the House of Commons his celebrated resolutions affirming 'that the influence of the Crown has increased, is increasing, and ought to be diminished;'[2] but it was not until the lapse of two more years, and after repeated motions of want of confidence in the Government, that Lord North was compelled to resign office. The King was now once more forced to fall back upon the Whigs, and Lord Rockingham again (March, 1782) became Prime Minister. He died, however, in the July following, when the King conferred the office of First Lord of the Treasury upon the Earl of Shelburne, the leader of the Chathamite section of the Whig party—a choice which caused a large part of the Ministry, including Charles James Fox, Burke, and the Duke of Portland, who represented the Rockingham section, to resign and go into factious opposition. Lord Shelburne continued in office long enough to conclude the Peace of Versailles (20 January, 1783), by which George III. at length acknowledged, without reserve, the Independence of the United States of America. But when the preliminary articles of Peace were laid before Parliament, the discontented Whig faction led by Fox entered into an unnatural coalition with the followers of Lord North, and by their adverse majority in the House of Commons compelled Lord Shelburne to resign.

Fall of Lord North's ministry, 1782.

Rockingham again Premier, 1782.

Ministry of Lord Shelburne, 1782.

The Coalition Ministry, 1783.

The King struggled hard against 'his new tyrants,' the successful leaders of the coalition. Twice he vainly solicited the younger Pitt—who had recently held office for the first time as Lord Shelburne's Chancellor of the Exchequer—to form an Administration; but at length (2 April, 1783), he found himself constrained to accept the Coalition Ministry, of which the Duke of Portland, Fox, and Lord North were the Chiefs. Chafing at his renewed

[1] Lord Brougham's Works, iii. 85.
[2] Cobbett's Parl. Hist. xxi. 347.

bondage, the King now thwarted his Ministers to the utmost of his power, and revived the unconstitutional tactics of 1766, through an organised opposition in Parliament by means of 'the King's friends.'

Organised opposition in Parliament by the 'King's friends' to Mr. Fox's India Bill, in 1783.

In order to defeat in the Lords the India Bill introduced by Mr. Fox, Secretary of State, Lord Temple was authorised to protest against it in the King's name and to canvass the Peers against this measure of his own Ministers. 'His Majesty,' the King wrote on a card, as an authority for the proceeding, 'allows Earl Temple to say that whoever voted for the India Bill was not only not his friend, but would be considered by him as an enemy; and if these words were not strong enough, Earl Temple might use whatever words he might deem stronger, and more to the purpose.'[1] Indignant at this conduct, the Commons passed a Resolution, on the 17th December, 1783, 'that to report any opinion, or pretended opinion, of his Majesty, upon any bill, or other proceeding, depending in either House of Parliament, with a view to influence the votes of the members, is a high crime and misdemeanour, derogatory to the honour of the Crown, a breach of the fundamental privileges of Parliament, and subversive of the constitution.'[2] On the very day that this Resolution was passed, the House of Lords rejected the India Bill, and on the following day the King dismissed his Ministers.

Declaration of the Commons against the use of the King's name, 17th Dec. 1783.

Abrupt dismissal of the Coalition ministry, 1783.

Critical relations of the King and Parliament.

Mr. Pitt, Premier, 1783.

This abrupt and contemptuous dismissal of a Ministry who were supported by a vast majority in the House of Commons brought the King into critical conflict with his Parliament, from which he was only saved by the genius, perseverance, and tact of William Pitt, who now consented to undertake the formation of a Government. In spite of votes of want of confidence, and of attempts to prevent a dissolution by postponing the supplies, the youthful Premier of twenty-five gained the enthusiastic support of the nation, and within four months the Opposition majority, which had

[1] Duke of Buckingham's Court and Cabinets of Geo. III. i. 288, 289; May, Const. Hist. i. 68.

[2] Comm. Journ. xxxix. 842.

been two to one against the Ministry, dwindled down to a bare majority of one. Parliament was now dissolved; and a general election gave to Pitt an overwhelming majority, which maintained him in power for seventeen years. The triumph of the King and the Minister was complete; the ascendancy of the Crown was established, and continued, for nearly fifty years, to prevail over every other power in the State. But the King's will was no longer supreme, as it had been during the Administration of Lord North. Although he continued his accustomed activity in public affairs, 'he had now a minister who, with higher abilities and larger views of state policy, had a will even stronger than his own. Throughout his reign, it had been the tendency of the King's personal administration to favour men whose chief merit was their subservience to his own views, instead of leaving the country to be governed—as a free state should be governed—by its ablest and most popular statesmen. He had only had one other minister of the same lofty pretensions—Lord Chatham; and now, while trusting that statesman's son—sharing his councils, and approving his policy—he yielded to his superior intellect.'[1] The wishes of the King, however, still exercised great influence on the Ministers in the general policy of the Government; and it was the King's persistent refusal to sanction the introduction of a measure for the relief of the Roman Catholics which at length caused Pitt, in 1801, to resign. Out of personal regard for the King, he shortly afterwards promised never to revive the Catholic question; and on his again taking office in 1804, he was prevented from strengthening his government by the admission of Mr. Fox to the Cabinet, by the King's absolute refusal. George declared 'that he had taken a positive determination not to admit Mr. Fox into his councils, *even at the hazard of a civil war*.'[2]

General election of 1784.

Triumph of Pitt and the King.

The King's Personal influence diminished;

but still very powerful.

During the successive Ministries of Addington (1801),

[1] May, Const. Hist. i. 78.

[2] Rose's Diaries and Corr. ii. 156, 182; Horace Twiss, Life of Eldon, i. 446 *seq.*

Pitt (1804), Grenville, Fox, and Addington, known as 'All the Talents' (1806), Portland (1807), and Perceval (1809), down to the year 1810, when the King's mental disease necessitated the appointment of a Regency, the Personal influence of the Sovereign remained predominant. In 1807, George III. even went so far as to require a written declaration from the Grenville Ministry that they would never, under any circumstances, propose to him further concessions to the Roman Catholics, *or even offer him any advice upon the subject.*[1] This flagrantly unconstitutional pledge, which Sir Samuel Romilly maintained in Parliament would have rendered any Ministers who gave it guilty of a high crime and misdemeanor,[2] was firmly but respectfully refused, and the refusal was immediately followed by the dismissal of the Ministry.

Diminution of Personal influence of the Sovereign since the reign of George III.

Since the reign of George III., but more especially since the Reform Act of 1832 made the House of Commons what it had ceased to be—a body really representing the opinions of the largest estate of the realm, the Commons of England—the Personal influence of the Sovereign in the Executive administration has steadily declined. It has, however, been asserted at intervals with effect. Under George IV., the influence of the Crown remained paramount, and the two great parties in the State sought the Royal favour first, as the avenue to Parliamentary support. Yet it was in this reign that the remnant of independent Kingship which had survived the Revolution, and even acquired renewed vigour and extension in the fostering hands of George III., may be said to have expired on the day when that King's son and successor, after a prolonged struggle, finally gave his consent to the Bill for Roman Catholic Emancipation in 1829.[3] William IV., indeed, in November, 1834, endeavoured to assert his personal wishes in the choice of a Ministry, without reference to the will of

Its occasional assertion.

Sudden dismissal of Lord Melbourne's Ministry by William IV. 1834.

[1] Letter of Lord Grenville to Marquis of Buckingham, 17 Mar., 1807, in Buckingham's Court and Cabinets of Geo. III. iv. 143.

[2] Hansard, 1st Ser. iv. 327.

[3] See Gladstone, Gleanings, i. 38, 78.

Parliament, by suddenly dismissing the Whig Ministry of Lord Melbourne, and entrusting to Sir Robert Peel the formation of a Government from a party whose followers numbered less than a fourth of the House of Commons.[1] But the impolicy of the act exceeded even its unconstitutionality. The new Premier dissolved Parliament; and the General Election again returned a Liberal majority, much smaller indeed than the former one, but sufficient, more compact, and better organised.

Short premiership of Sir Robert Peel followed by the recall of the Melbourne ministry, 1835.

After a gallant struggle—in which he rivalled the great qualities formerly displayed by Pitt—against the hostile majority which his appeal to the country had evoked, Peel was compelled to resign, and in April, 1835, the Melbourne ministry, with some alterations, was reinstated in office. It was still in power at the accession of her present most gracious Majesty, and was at once honoured with her confidence.

The Bedchamber Question, 1839.

Growing unpopularity caused the Melbourne Ministry to resign in 1839, and the summons of Sir Robert Peel to form an Administration gave rise to what is known as the 'Bedchamber Question.' Nearly all the ladies of the Household were related to the members of the Melbourne Cabinet or to their political adherents; and Sir Robert Peel, convinced of the difficulties which would beset a Minister who should leave about Her Majesty's person the nearest relatives of his political opponents, informed the Queen that he could not undertake the formation of a Ministry unless he was permitted to make some changes in the higher offices of the Court, including the ladies of

[1] 'The right of the King to dismiss his ministers,' observes Sir Erskine May, 'was unquestionable: but constitutional usage has prescribed certain conditions under which this right should be exercised. It should be exercised solely in the interests of the State, and on grounds which can be justified to Parliament, to whom, as well as to the king, the ministers are responsible. . . . It was not directly alleged that the ministers had lost the confidence of the king; and so little could it be affirmed that they had lost the confidence of Parliament that an immediate dissolution was counselled by the new administration. The act of the King bore too much the impress of his personal will, and too little of those reasons of state policy by which it should have been prompted: but its impolicy was so signal as to throw into the shade its unconstitutional character.' Const. Hist. i. 147.

her Bedchamber. The Queen, by the advice of Lord Melbourne and his colleagues, refused 'to adopt a course which she conceived to be contrary to usage, and which was repugnant to her feelings.' Sir Robert Peel declined to accept office on those terms; and the Melbourne Ministry conducted the government for two years longer. It again resigned in 1841, after an appeal to the country had failed to reverse the verdict of the House of Commons, pronounced by a majority of one, on a Resolution of Sir Robert Peel, affirming that the Ministers of the Crown did not possess the confidence of the House of Commons, and 'that their continuance in office under such circumstances, was at variance with the spirit of the Constitution.' On assuming office, Peel met with no further difficulties on the Bedchamber question; and the principle for which he contended has since been admitted, on all sides, to be Constitutionally correct.[1]

Sir Robert Peel's resolution of want of confidence in the Ministry, 1841.

Sir Robert Peel, Premier, 1841.

The latest illustration of the personal share which the Sovereign takes in public business is afforded by the Memorandum communicated by the Queen, in 1850, through Lord John Russell, her Prime Minister, to Lord Palmerston, the Secretary of State for Foreign Affairs.[2]

The Queen's Memorandum on the relations of a Secretary of State to the Crown, 1850.

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[1] By the existing arrangement, which has now long prevailed, the Mistress of the Robes, who is only an attendant at Court on great occasions, changes with the Ministry, but the Ladies in Waiting, who are periodically resident at the Court, and by virtue of their office enjoy much closer personal contact with the Queen, are appointed and changed without regard to the political connexions of their husbands. Gladstone, Gleanings, i. 40.

[2] [This Memorandum is obviously connected with the Pacifico case, and illustrates what the *Edinburgh Review*, Jan. 1890, Art. *The Life of Lord John Russell*, calls the 'three-cornered duel,' which, as it says, went on during the greater part of Lord John's Administration between Lord Palmerston, the Premier, and the Court. The *Edinburgh* Reviewer, *loc. cit.*, p. 20, cites from Mr. Walpole's *Life* a letter from Lord John to Lord Palmerston, 18th Feb., 1850, in which occur passages shewing that the Queen expected to see the last draft of Despatches sent by the Foreign Secretary to British Representatives abroad. 'The Queen asked me again yesterday about the Despatch to Wyse, and said she had not seen it again. . . . She expressed great displeasure that the despatch had been sent off without inserting the discretionary power to Wyse and Parker which I had recommended. . . . Here, then, is a despatch gone on an important subject which is not in conformity with the Queen's opinions, or mine, or that of the Cabinet.' Lord Palmerston, replying the same day, mentions having received a memorandum from the Queen the day before [17th Feb.] in which she said that Lord John had told her that the Foreign Secretary had 'sent off, *unaltered*,' the despatch of which on Friday the

'The Queen requires,' it declared, 'first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she is giving her royal sanction. Secondly, having once given her sanction to a measure, that it be not arbitrarily altered or modified by the minister. Such an act she must consider as failing in sincerity towards the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that minister. She expects to be kept informed of what passes between him and the foreign ministers before important decisions are taken based upon that intercourse; to receive the foreign despatches in good time; and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off.' But in controlling one Minister the Sovereign still acts upon the advice and responsibility of another—her first minister—to whom copies of despatches and other information are also communicated in order to enable him to give such advice effectually.[1]

Constitutional right of dismissing a Minister

The Constitutional right of dismissing a minister, asserted in the Queen's Memorandum, is now practically placed at the disposal of the Premier and the Cabinet, who are thus enabled, as a whole, to exercise, through the Crown, a check upon each individual member. This was exemplified, shortly after the French *coup d'état* of the 2nd December, 1851, when Lord Palmerston was removed from the Foreign Secretaryship in Lord John Russell's Administration, on the ground that he had exceeded his authority in expressing to the French Ambassador opinions favourable to

asserted in the removal of Lord Palmerston from the Foreign Secretaryship in 1851.

Queen had sent him the draft, accompanied by a memorandum from Lord John suggesting two alterations in which the Queen said that she herself concurred. Lord Palmerston then says that he sent the Queen the draft itself, 'with the alteration which he *did* make in it, and Lord John's own note stating that such alteration was very good.' What results from all this is clearly, as the *Edinburgh* Reviewer remarks, that Lord Palmerston's idea was to be 'the autocrat of the Foreign Office,' but it seems equally clear that in the Pacifico case, at least, Lord John Russell was not fair to him, and practically misrepresented Lord Palmerston's conduct to the Queen. Under such circumstances the 'three-cornered duel' was inevitable.—ED.]

[1] Statement by Lord John Russell, Hansard, Deb. 3rd ser. cxix. 91; May, Const. Hist. i. 160; Martin, Life of the Prince Consort, ii. 300 *seq.*

the policy of the recent *coup d'état* and at variance with the Non-Intervention despatch agreed upon by the Cabinet.[1]

Increased power of the Executive.

While the Personal influence of the Sovereign in the government of the country has steadily decreased since the reign of George III., the power of the Crown, as wielded by its Ministers, has continued to increase from the Revolution down to the present time. The expansion of the Empire, the great extension of public establishments, the vast increase of patronage—civil, military, and ecclesiastical—and the more profuse distribution of honours, have all largely added to the influence of the Executive Government, while its coercive power has been augmented by the establishment of the Police, the recent concentration of the military forces, the abolition of purchase in the army, and the transfer of the command and jurisdiction over the auxiliary forces to the Sovereign, to be exercised through the Secretary of State for War. During the present reign the power and influence of the Crown, always wisely and Constitutionally exercised for the public benefit, on the advice of responsible Ministers, have provoked no attempts at restraint; and the Personal power of the Sovereign, as distinguished from the power of the Regal office, having been restrained within due limits, the ancient jealousy of the Crown, inherited from the struggles of our ancestors, may now almost be said to have died out.

Revenues of the Crown.

It was at the Revolution that a limitation was for the first time imposed upon the personal expenditure of the Sovereign. Previously it had been customary for the Parliament, at the commencement of each reign, to grant to the King the ordinary Crown revenues consisting of (1) the hereditary revenues of the Crown itself, viz., the rents of Crown lands, the feudal rights (surrendered by Charles II. in 1660, in exchange for the excise duties), the proceeds of the Post-Office and wine licences; and (2) the produce of taxes voted to the King for life. The annual revenue of Charles II. from these sources was sometimes a little above, some-

[1] May, Const. Hist. i. 161.

times a little below, the sum of £1,200,000, which was fixed by Parliament as the ordinary revenue of the Crown; that of James II. amounted on an average to £1,500,964 a year, out of which the King was expected, in time of peace, to support the Royal dignity and Civil government and also the public defence. But whatever remained after payment of these necessary expenses of the government was at the King's absolute disposal; in addition to which Charles II. did not hesitate to apply to his own privy purse large sums of money which had been specially appropriated by Parliament for the purposes of the war. At the accession of William and Mary, however, Parliament fixed the annual revenue of the Crown, in time of peace, at £1,200,000, of which about £700,000 (derived from the hereditary revenues of the Crown, and from a part of the Excise duties) was separately appropriated to what was afterwards called the King's 'Civil List,' comprising the personal expenses of the King, the support of the Royal Household, and also the payment of civil offices and pensions, which were more fairly chargeable to the remaining portion of the Crown revenue devoted to the strictly public expenditure of the State.

The 'Civil List.'

The principle that the King's regular and domestic expenses should be restricted to a fixed annual sum distinct from the other departments of public expenditure, was adhered to in succeeding reigns, and down to the accession of George II. the Civil List was maintained at £700,000. Both Anne and George I., however, incurred debts, the former of £1,200,000, the latter of £1,000,000, which were discharged by Parliament by loans charged upon the Civil List itself. The Civil List of George II. was fixed at a minimum of £800,000, Parliament undertaking that if the Hereditary revenues should produce less than that sum it would make up the deficiency—a liability which it discharged in 1746, by paying off a Civil List debt of £456,000. But the direct control of Parliament over the personal expenses of the King was first acquired on the accession of George III., who surrendered to the nation

his life interest in the hereditary revenues, and all claim to any surplus which might accrue from them, in return for a fixed Civil List of £800,000 (increased in 1777 to £900,000) 'for the support of his household, and the honour and dignity of the Crown.' In addition, however, to the fixed Civil List, George III. enjoyed a considerable further income, derived from the Droits of the Crown and Admiralty and other sources, which was wholly independent of Parliamentary control; and yet, notwithstanding the King's economical and even parsimonious mode of living, and the removal, from time to time, from the Civil List of various charges which were unconnected with the personal comfort and dignity of the Sovereign, his struggle to establish the ascendancy of the Crown by systematic bribery of members of Parliament with places, pensions, and direct gifts of money, compelled him to make repeated applications to the nation for payment of debts upon the Civil List. Altogether, the arrears paid off by Parliament during his reign—exclusive of a debt of £300,000 charged on the Civil List in 1782, when its expenditure was curtailed and split up into separate classes—amounted to a total of £3,398,000.[1]

William IV., on his accession, surrendered not only the Hereditary revenues, but all the other sources of revenue which had been enjoyed by his predecessors; receiving in return a Civil List of £510,000, which was at the same time relieved from most of the charges which more properly belonged to the civil government of the State. The Civil List of Queen Victoria was settled, on the same principles, at the annual sum of £385,000; and while the removal of civil charges has freed the Crown from any suspicion of indirect influences, the improved administration of the present Sovereign and her two immediate predecessors has rendered it unnecessary to apply to Parliament during their reigns for the discharge of debts upon the Civil List.

[1] Report on Civil List, 1815, p. 4; May, Const. Hist. i. 243.

Crown lands.

The surrender of the Crown lands to be disposed of by Parliament, like the other revenues of the State, for the public service—begun by George III. and now 'by a custom as strong as law' repeated by each sovereign at the beginning of his reign—is one instance among others of the return in modern Constitutional usage to the simpler principles of the older Constitution. We have seen, in an earlier chapter, how the *Folkland*, the land of the nation, which could not be alienated without the consent of the Witan, gradually changed into *Terra Regis*, the land of the King, to be dealt with according to his personal pleasure.[1] Continually augmented by feudal escheats and forfeitures, the Crown lands were as continually diminished by improvident grants to the Royal favourites and followers. Attempts were made to check this abuse from time to time, but without effect, and Charles I. still further diminished the Royal patrimony by extensive sales and mortgages. His example was followed by the Parliaments of the Commonwealth; and although at the Restoration these latter sales were declared void, Charles II. soon squandered the estates which had been restored to the Crown, and in three years reduced their annual income from £217,000 to £100,000. James II. and William III. were equally liberal and improvident, and, on the accession of Queen Anne, it was found by Parliament that the Crown lands had been so reduced that the net income from them scarcely exceeded the rent-roll of a squire.[2] To preserve what still remained, an Act was passed (1 Anne, c. 8, s. 5) which, after sadly reciting 'that the necessary expenses of supporting the Crown, or the greater part of them, were for-

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[1] *Supra*, pp. 15, 17.

[2] The Crown lands received some augmentation from forfeitures after the rebellions of 1715 and 1745; but during the first 25 years of Geo. III. they produced a net average rental of little more than £6,000 a year. Improved administration and the rise in the value of land have since rendered them much more productive. In 1798 they were valued at £201,250 a year; in 1812 at £283,160; in 1820 they actually yielded £114,852; in 1830 they produced £373,770; and in 1860 they returned an income of £416,530, exceeding the Civil List granted to the Queen. May, Const. Hist. i. 255.

merly defrayed by a land revenue, which had, from time to time, been impaired by the grants of former kings and queens, so that her Majesty's land revenues could then afford very little towards the support of her government,' prohibited absolute grants entirely, and prescribed stringent conditions as to the length of term and rentals of all future leases. Thus the small remnant of the land which had once been the land of the people was saved from utter dissipation, and since its restoration to the nation by George III. 'the *Terra Regis* of the Norman has once more become the *folkland* of the days of our earliest freedom.'[1]

Private property of the Sovereign

This change has been accompanied by the restoration to the Crown of a right which it had lost during its uncontrolled tenure of the hereditary estates. During the days when the *Folkland* was really the land of the people, the King, equally with the subject, had enjoyed the right of inheriting, purchasing, devising, and otherwise disposing of lands which were his own private property.[2] But when the Kingship had become more strictly hereditary, and the lands of the nation came to be regarded as the property of the King, the person and the office of the King were held to be so thoroughly identified that his private estates were merged in the Royal demesne and made incapable of alienation by will. After the restoration of the Crown lands to the nation, it was felt to be reasonable 'that a restriction which belonged to a past state of things should be swept away, and that sovereigns who had surrendered an usurped power which they ought never to have held should be restored to the enjoyment of a natural right which ought never to have been taken from them.'[3] Accordingly the Sovereign has again been invested with the right of acquiring and disposing of private property in the same manner as any other member of the nation.[4]

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[1] Freeman, Growth of Eng. Const. p. 134.
[2] *Supra*, p. 16, *Ib. n.* 1.
[3] Freeman, Growth of Eng. Const. p. 136; and see Allen, Royal Prerogative, p. 154.
[4] See 39 & 40 Geo. III. c. 88; 4 Geo. IV. c. 18; 25 & 26 Vict. c. 37.

II. The House of Lords.

(II.) The House of Lords.

Since the Revolution, the House of Peers—the lineal representative of the old Great Councils and the older Witenagemots[1]—has undergone changes in its numbers, composition, and political weight and influence, greater even than the changes which, during the same period, have so materially affected the practical exercise of the authority of the Crown in government and legislation. In the Parliament of 1454, the last held before the outbreak of the Wars of the Roses, the number of lay Peers who attended was 53. In 1485, only 29 received writs of summons to the first Parliament of Henry VII.[2] The greatest number summoned by Henry VIII. was 51, which had increased at the death of Elizabeth to 59. In the meantime, by the suppression of the monasteries and the consequent removal from the Upper House of about 36 abbots and priors, the Spiritual Peerage (including 5 of the new sees created by Henry VIII.[3]) had been reduced to the number of 26, at which it has ever since remained.

Number of Peers.

Rapid increase under the Stuart kings.

The four Stuart kings created 193 new Peers, but as during their reigns 99 peerages became extinct, the number of the Peerage at the Revolution of 1688 actually stood at about 150, which was raised by William III. and Queen Anne to 168. The House of Lords was further increased in 1707, on the passing of the Act of Union with Scotland, by the addition of 16 Representative Peers from that kingdom, elected at the commencement of every Parliament. This rapid augmentation of the Peerage, but more especially the realization of the power of the Crown to swamp the majority in the Upper House (manifested in 1711 by Queen Anne's creation of 12 peers in one batch), excited the jealousy of the Lords[4]; and

Addition of 16 Representative Peers of Scotland in 1707.

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[1] *Supra*, pp. 236, 238.
[2] *Supra*, p. 383.
[3] *Supra*, p. 400, *n.* 1.
[4] [The fears to which such a practice might naturally give rise have been felt in much later days. In 1832 the Duke of Wellington wrote to Lord

this feeling—acting in conjunction with the fear lest the Prince of Wales, who was in opposition to his father, should on coming to the throne make use of his prerogative to overthrow the Whig majority in the Upper House by the creation of Tory peers—induced the Whig ministry of Sunderland and Stanhope in 1719 and 1720 to support proposals for the limitation of the Royal prerogative of creating Peers. With the concurrence of George I., Bills were introduced, in the former year by the Duke of Somerset, and in the latter by the Duke of Buckingham, providing that, with an exception in favour of Princes of the Blood, the Crown should be restrained from augmenting the then existing number of 178 peerages by more than 6, although new peerages might be created in the place of any which should become extinct; and that 25 hereditary [Representative] Peers should be substituted for the 16 elective [Representative] Peers of Scotland.[1] This

Attempts to limit the prerogative of creating Peers in 1719 and 1720.

Lyndhurst, as cited in Sir Theodore Martin's *Life of Lord Lyndhurst*, Lond. 1883, p. 300, *n.* 1, 'They say here that the object of Lord Grey's visit to Brighton is to create peers. If it is so, I am convinced that he will be successful and that there is an end to the character and independence of the House of Lords.' The same point is illustrated in Mrs. Hardcastle's *Life of Lord Campbell*, i. 525, where Lord Campbell writes, 'As I anticipated, the notion of making *quant. suff.* of peers won't do. Lord Cawdor, a staunch Reformer, has just said to me, "I shall make no objection to sixty new peers if I can be made a commoner."' Curiously enough, something very like Lord Cawdor's *reductio ad absurdum*, as it was no doubt intended to be, of the proposed action of Lord Grey, is now seriously brought forward by the Earl of Rosebery, under the name of Reform of the House of Lords.—ED.]

[1] [The word 'Representative' has been inserted in the text in order, it is hoped, to make more clear the intention of the Bills, which must have been to substitute for the existing sixteen Elective Representative Peers of Scotland twenty-five Representative Peers with Hereditary seats in the House of Lords as such, and consequently to make the Representation of the Scottish Peerage in the House hereditary in the blood of the Peers chosen under the powers of the Bills, who would thus themselves have been the last Elective Representatives of the Scottish Peerage. This would, of course, have entirely altered the character of the Representation, and would have been at direct variance with the provisions of the Treaty of Union. The expression in the original text here might have been read as importing that the Scottish Peerage was not hereditary, which, of course, was far from being intended by the author. It is suggested elsewhere by the present Editor that the hereditary character of Peerage is shewn by the case of the Scottish and Irish Peerages to be a distinct thing from the hereditary character of seats in the House of Lords, and that some light may possibly thus be thrown on future re-arrangements of the Upper House, in conformity with modern demands for what is called an infusion of fresh blood into that Chamber as a condition of its retention.—ED.]

unconstitutional scheme was strongly opposed in the House of Commons by Sir Robert Walpole and others, and finally rejected by a large majority (269 to 177).[1] Its passing would have transformed the House of Lords into a close aristocratic body, independent alike of the Crown and of the people. It would have eliminated from the complex mechanism of the Constitution what has been termed its 'safety-valve,'[2] — that peer-creative power by which the Sovereign, on the advice of his responsible Ministers, is enabled, in cases of great emergency, to force the Peers to bow to the will of the people expressed by their representatives in the House of Commons, and thus to render possible the smooth and continuous working of our present system of Parliamentary government.

Profuse creation of Peers under George III.

At the accession of George III. the number of peerages amounted to only 174, but throughout his long reign new creations were multiplied with unprecedented profusion. In the earlier part of his reign the peer-creative power was mainly wielded by the King himself, as one means of carrying out his determination to break up the system of party government; but the younger William Pitt, on acceding to office, employed it for another and a far nobler purpose. The consolidation of his own authority as Minister was naturally one of the objects which he had in view, but his great aim was to reform the House of Lords by changing it from a narrow and exclusive caste into a large representation of the intellect, the achievements, and more especially of the wealth of England. He wished, he said in effect, 'to reward eminent merit, to recruit the peerage from the great landowners and other opulent classes, and to render the Crown independent of factious combinations among the existing peers.'[3] With this object, while himself disdaining honours, he dispensed them to others with the greatest profusion. In

Pitt and the Peerage.

[1] Lord Mahon, Hist. of Eng. i. 530–546.
[2] Bagehot, Eng. Const. 229.
[3] Speech on the 16th January, 1789, Cobbett's Parl. Hist. xxvii. 942, 943 May, Const. Hist. i. 278.

the first five years of his administration he created 48 new Peers; at the end of eight years he had created between 60 and 70; and later, in the two years 1796–7, he created no less than 35. In 1801, at the end of his seventeen years' administration, his creations had reached the total of 141.

The example set by Pitt was followed by succeeding Ministers, and at the end of George III.'s long reign of sixty years the actual number of peerages conferred by that King (including some promotions of existing Peers to a higher rank) amounted to the enormous number of 388. The House of Lords was further augmented on the Union with Ireland in 1801, by the addition of 28 Irish Representative Peers, elected, not for each Parliament only like the Scotch Representative Peers, but for life.[1] At

Addition of 28 Representative Peers of Ireland, 1801.

[1] There were other differences in the mode of treating the Scotch and Irish peerages. From the date of the Union with Scotland the Crown has been debarred from creating any new Scottish peers, but the then existing Peerage of Scotland was perpetuated in its integrity. On the Union with Ireland, however, it was determined to gradually diminish the excessive numbers of the Irish nobility, and it was therefore provided by the Act of Union that only one Irish peerage should be created for every three which should become extinct, until the reduction of the number to 100, *at which figure it should be maintained* by the creation of one Irish peerage as often as a peerage became extinct, or as often as an Irish peer should become entitled, by descent or creation, to a peerage of the United Kingdom. At the same time the privilege was granted to all Irish Peers (except the representative twenty-eight for the time being) of sitting in the House of Commons if elected by any constituency in Great Britain, but not in Ireland. The Peerage of both Scotland and Ireland has been undergoing a process of gradual absorption into the Peerage of the United Kingdom. 'The inadequacy of the representation of the Scottish Peerage (which at the date of the Union was only less numerous by 12 than that of England) has since been rectified to a great extent by the admission of Scottish Peers to hereditary seats in the House of Lords of the United Kingdom. There are now no less than 45 Peers of Scotland with such hereditary seats, and by this process of absorption, as well as by extinctions and dormancies, the number of Peers of Scotland who have not hereditary seats in the House of Lords has been diminished from 154 in 1707, to 34 in 1875. Out of these 34 Scottish Peers 16 have seats as Representative Peers, leaving only 18 without seats in the House of Lords. Of the 45 absorptions, 39 have taken place since the beginning of the present century. At that rate, and without taking into account possible extinctions, these 18 Peers may be absorbed in about 35 years' time. Whenever that event takes place the 16 remaining Scottish Peers, although still technically not embraced in the Peerage of the United Kingdom, would to all intents and purposes be included therein; and, instead of going through the farce of self-election, would, doubtless, be created hereditary Peers of Parliament. . . . The Peerage of Ireland, which in 1801 numbered 234, has been reduced by extinctions, and notwithstanding the creation of 19 post-Union Peers, to 185. Of these, no less than 81 are now

The Peerages of Scotland and Ireland.

the same time four Irish Bishops were admitted to seats in the Upper House of the United Kingdom, sitting by rotation of sessions as representatives of the Irish Episcopate. But on the disestablishment of the Church of Ireland in 1869, the Irish Bishops lost their seats in Parliament.[1]

Peers of the United Kingdom. Of the remaining 104, who are solely Peers of Ireland, 28 are Representative Peers, thus leaving 76 without seats in the House of Lords. Since the Union there have been 66 extinctions, in addition to the 81 absorptions into the Peerage of the United Kingdom. If the same average rates of extinction and absorption should continue, the 76 Peerages now without seats may be expected to be extinguished or absorbed in about 39 years. . . . It is as a means of perfecting the National and Representative character of the House of Lords, and of consummating the Parliamentary incorporation of the three United Kingdoms, that a measure for accelerating the gradual absorption of the Scotch and Irish Peerages into the Peerage of the United Kingdom, deserves the support of the National Parliament. But the point of greatest urgency at the present time is to put a stop to the creation of any fresh Irish Peerages, so as to allow the normal operation of extinctions and absorptions to continue to produce its natural effect.' *Law Magazine and Review*, No. ccxx., May, 1876, art. 'The Representative Peerage of Scotland and Ireland.' By T. P. Taswell-Langmead. [This question had also engaged the serious attention of the late Earl of Crawford and Balcarres, who, in 1874, on the occasion of the appointment of a Select Committee of the House of Lords to report upon "the state of the Representative Peerage of Scotland and Ireland and the laws relating thereto," printed a memoir on the subject, which he circulated privately among his brother Peers and others, and of which he kindly gave the present Editor a copy. Both schemes have the defect, as it appears to us, of not taking into account the alteration in numbers which would be effected in the Scottish and Irish Peerages by the revival of dormant titles and the reversal of attainders. The Earl of Crawford, dealing only with actual holders of Scottish and Irish Peerages, expressly excluded dormant titles from his view, and for the purposes of his scheme this included forfeited titles. Taswell-Langmead, it is believed, simply passed them by, without giving a thought to either case, probably as not seeming to him to be within the range of 'practical politics.' But a claim to a dormant Scottish or Irish peerage may, *ex hypothesi*, be established at any moment; and it is always possible that an Act may be passed to reverse a particular attainder. It would have been more satisfactory, therefore, to have had these further questions considered by two such specially competent authorities. It seems difficult to justify the continued detention 'in shade' (to adapt a well-known simile used by Lord Crawford) of so many illustrious titles, which the student of history may be excused for wishing to see once more brought out into the glad 'sunshine' of political life.—ED.]

[1] Attempts were made in 1834, 1836, and 1837, to exclude the Episcopal element altogether from the House of Lords, but unsuccessfully. It was, however, determined by the Legislature in 1847, when a new bishopric was created for Manchester, that no increase in the existing number of twenty-six Bishops in the Upper House should take place (10 & 11 Vict., c. 108). The two Archbishops, and the Bishops of London, Durham, and Winchester, have always a right to sit in Parliament, but the bishop last elected to any other see (except Sodor and Man, whose bishop is in no case a lord of Parliament) cannot claim a seat until another vacancy has occurred. May, Const. Hist. i. 301; Stephen, Com. (5th ed.) iii. 10. [The case of the Bishop of Sodor and

Changes in the character and composition of the House of Lords.

The vast increase in the Peerage under George III. affected not merely the numbers but the whole character of the House of Lords. 'Up to this time,' observes a recent historian,[1] 'it had been a small assembly of great nobles, bound together by family or party ties into a distinct power in the State. By pouring into it members of the middle and commercial class, who formed the basis of his political power, small landowners, bankers, merchants, nabobs, army contractors, lawyers, soldiers, and seamen, Pitt revolutionized the Upper House. It became the stronghold, not of blood, but of property, the representative of the great estates and great fortunes which the vast increase of English wealth was building up. For the first time, too, in our history, it became the distinctly conservative element in our constitution. The full import of Pitt's changes has still to be revealed, but in some ways their results have been very different from the end at which he aimed. The larger number of the peerage, though due to the will of the Crown, has practically freed the House from any influence which the Crown can exert by the distribution of honours. This change, since the power of the Crown has been practically wielded by the House of Commons, has rendered it far harder to reconcile the free action of the Lords with the regular working of constitutional government. On the other hand, the larger number of its members has rendered the House more responsive to public opinion, when public opinion is strongly pronounced; and the political tact which is inherent in great aristocratic assemblies has hitherto prevented any collision with the Lower House from being pushed to an irreconcileable quarrel. Perhaps the most direct result of the change is seen in the undoubted

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Man is peculiar, but the statement that he is "in no case a lord of Parliament" is perhaps too strong. There is probably no exact technical language suited to his position, the result, no doubt, of the continued separate identity of the Kingdom of Man, and of its former Ecclesiastical relations with Scotland and Norway. The Bishop, we apprehend, was always a Baron of the Kingdom of Man.—ED.]

[1] J. R. Green, Short Hist. of Eng. People, p. 792.

popularity of the House of Lords with the mass of the people. The large number of its members, and the constant additions to them from almost every class of the community, has secured it as yet from the suspicion and ill-will which in almost every other constitutional country has hampered the effective working of a second legislative chamber.'

Political position of the House of Lords.

The largely increased numbers of the House of Lords, and the more representative character which it has acquired through the changes in its composition here briefly sketched, have enabled it to preserve very much of its ancient authority and political influence. But it has nevertheless tended—especially since the Reform Act of 1832—to decline more and more from the position which it still theoretically occupies, of a co-ordinate Legislative power, and to become simply a revising and suspending House—altering and modifying Bills sent up from the Commons, rejecting them sometimes when the mind of the nation is not thoroughly made up in their favour, but yielding to the National will whenever unequivocally expressed.[1]

Determined opposition of the Lords to the Reform Bills of 1831 and 1832

The Constitutional position of the Lords with regard to legislation of which they disapprove, but which is supported by the Ministers of the Crown, the House of

[1] The late Earl of Derby, in speaking against the second reading of the Corn Importation Bill, in 1846, said: 'My lords, if I know anything of the constitutional importance of this House, it is to impose a salutary obstacle to rash and inconsiderate legislation; it is to protect the people from the consequences of their own imprudence. It never has been the course of this House to resist a continued and deliberately expressed public opinion. Your lordships always have bowed, and always will bow, to the expression of such an opinion; but it is yours to check hasty legislation leading to irreparable evils.' (Hansard, Deb. lxxxvi. p. 1175). Similarly, the late Lord Lyndhurst, speaking on the second reading of the Oaths Bill, in 1858, said in the House of Lords: 'It is part of our duty to originate legislation; but it is also a most important part of our duty to check the inconsiderate, rash, hasty, and undigested legislation of the other House;—to give time for consideration; and for consulting or perhaps modifying the opinions of the constituencies; but I never understood, nor could such a principle be acted upon, that we were to make a firm, determined, persevering stand against the opinion of the other House of Parliament, when that opinion is backed by the opinion of the people; and, least of all, on questions affecting, in a certain degree, the constitution of that House, and popular rights. If we do make such a stand, we ought to take care that we stand on a rock.' (Hansard, Deb. 3rd ser. ii. p. 1768.)

Commons, and the people, may be said to have been definitely settled by the result of the memorable struggle with the Upper House in 1831 and 1832 on the passing of the Reform Bill. After sixteen Peers had been created to assist the progress of the measure, the continued opposition of the House of Lords was at length overcome by the private persuasions of the King, and the knowledge that he had consented to his Ministers' request for power to create a sufficient number of Peers to ensure a majority.[1]

overcome by a threatened creation of peers;

The threatened creation of Peers was denounced at the time by the Duke of Wellington and the Tory party generally as 'an unconstitutional exercise of the prerogative;' but it was admirably answered by Earl Grey: 'I ask what would be the consequences if we were to suppose that such a prerogative did not exist, or could not be constitutionally exercised? The Commons have a control over the power of the Crown, by the privilege, in extreme cases, of refusing the supplies; and the Crown has, by means of its power to dissolve the House of Commons, a control upon any violent and rash proceedings on the part of the Commons; but if a majority of this House is to have the power, whenever they please, of opposing the declared and decided wishes both of the Crown and the people, without any means of modifying that power,—then this country is placed entirely under the influence of an uncontrollable oligarchy. I say that, if a majority in this House should have the power of acting adversely to the Crown and the Commons, and was determined to exercise that power, without being liable to check or control, the constitution is completely altered, and the government of this country is not a limited monarchy: it is no longer, my lords, the Crown, the Lords, and the

which is denounced as unconstitutional.

Earl Grey's vindication of the proposed creation

[1] 'The King grants permission to Earl Grey, and to his Chancellor, Lord Brougham, to create such a number of Peers as will be sufficient to ensure the passing of the Reform Bill,—first calling up Peers' eldest sons. WILLIAM, R. Windsor, May 17th, 1832.' Roebuck, Hist. of the Whig Ministry, ii. 331–333.

Commons, but a House of Lords—a separate oligarchy—governing absolutely the others.'[1]

An extraordinary creation of Peers equivalent to a dissolution.

In its practical aspect, an extraordinary creation of Peers is to the House of Lords what a dissolution is to the House of Commons: and although such a creation ought never to be made use of except in the greatest emergency, its use in such an emergency is not only constitutional, but essential to the safety of the Constitution itself.[2]

Political weight of the Peers affected by their small attendance and indifference to business.

The political weight of the Upper House has been to some extent injuriously affected by the indifference to public business[3] displayed (though with many brilliant exceptions) by the great body of its members, and by their scanty attendance, favoured by the rule which requires only three peers to make a quorum, and by the practice of giving proxies. By a resolution of the House, in 1868, this latter practice has been advantageously discontinued; but the attempts made, in 1855 by the Crown,[4] and in the following year by Bill founded on the recommendation of a committee of the Lords, to increase the critical power and representative character of the Upper House by calling up men of ability as life-peers, were unfortunately defeated.[5]

Proxies discontinued, 1868.

Attempts to revive Life-Peerages.

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[1] Hansard, Deb. 3rd ser. xii. 1006 (May 17, 1832).

[2] See May, Const. Hist. i. 315.

[3] [This allegation of 'indifference to public business' seems scarcely warranted by the facts during the long and stormy controversies which have agitated both Houses, since the author's death, subsequently to the last change of Ministry. The Debates in the House of Lords on the Irish Question, the pivot on which the agitation has mainly turned, have been frequently commented upon by the Press as contrasting favourably for grasp of the real issues, and also, which is by no means the least praise, in these days of all-night sittings and obstruction in the Commons, for their business-like brevity. Except among those who can see nothing good in the Upper House, the general attitude recently held by the House of Lords has probably given it a firmer hold on the Public mind as a Second Chamber of value to the Constitution than it perhaps had when Taswell-Langmead wrote. During former critical periods in the century, moreover, members of the Lower House, who were on the side of Reform found themselves able to praise the 'great talent' of the Lords in debate, as may be seen in the *Life of Lord Campbell*, by the Hon. Mrs. Hardcastle. Lond. 1881, pp. 525-6, in the account of the discussion of the Reform Bill, 1831. On this occasion, Lord Campbell's opinion of the character of the debates in the Lords was clearly much higher than that which he had of the debates in the Commons. And his witness is evidently impartial.—ED.]

[4] *Supra*, p. 240, *n.* 2.

[5] [Although Peerages for life, *eo nomine*, are probably still not viewed very

III. The House of Commons.

(III.) The House of Commons.

Like the House of Lords, the House of Commons has also undergone very important changes in its numbers, its composition, and its political influence. In the year 1295, the date of the perfect constitution of the national Parliament, under Edward I.,[1] the members of the Lower House numbered 274, comprising 74 knights of the shire, and 200 citizens and burgesses. Under Edward III. and his three immediate successors the number of the burgesses was about 180, fluctuating in different Parliaments according to the negligence or partiality of the Sheriffs in omitting places which had formerly returned members. New boroughs, however, either on account of their growing importance or to increase the authority of the Crown in the Lower House, were from time to time summoned to return representatives, and at the accession of Henry VIII. we find 111 cities and boroughs (all of

Number of members.

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favourably by the Lords, the principle has been practically conceded in the creation of Lords of Appeal, with seats for life, technically intended as Law Lords to help the Upper House with its Scottish and Irish Appeal business. The high eminence of such men as Lord Blackburn, Lord O'Hagan, and others who have been so promoted can only reflect fresh dignity upon the House which they have adorned, and may pave the way to wider measures in this direction, if such should yet appear to be needed. It would seem that there is in this country some confusion between the principle of Hereditary Titles and the Hereditary character of seats in the Upper House. No doubt every Peer is a potential counsellor of the Sovereign, and possesses a theoretical right of access to the Sovereign for the purpose of giving counsel. But between this right *in posse*, and a hereditary seat *in esse*, a distinction might conceivably be drawn. It seems even possible that if the invasion of the hereditary character of the seat involved in the creation of Life Peerages should continue to be held as objectionable in the Future as it was in the Past by Lord Lyndhurst and others, in the Wensleydale case, a *modus vivendi* might be arrived at by means either of election or selection, or a combination of the two. In several continental monarchies, such as Austria and Italy, the Senate or Herren Haus is partly recruited from members of Noble Houses, enjoying Hereditary Titles which, however, do not give a right to a Hereditary seat in the Upper Chamber. There seems to be less clumsiness about this solution of the problem than there is in our present creation of Lords of Appeal who, not being, it is apprehended, technically ennobled in blood, would in strictness not be triable by the Lords for any offence for which a Hereditary Peer would be so triable. It may even perhaps be doubted how far such Lords could claim any of the ordinary privileges of Peerage, and so anomalous a position would probably not have been tolerated or even devised in a country less full of Constitutional anomalies and antinomies than our own.—ED.]

[1] *Supra*, pp. 258, 273.

which retained the privilege down to the Reform Act of 1832) represented in Parliament by 224 citizens and burgesses. In this reign the number of Members was considerably increased by the addition of representatives for Wales,[1] and the Tudor sovereigns systematically pursued the policy of creating insignificant boroughs—many of them mere villages—for the express purpose of corruptly supporting the influence of the Crown in the House of Commons.[2] Between the reigns of Henry VIII. and Charles II. no less than 180 Members were added to the House by Royal charter alone.[3] The borough of Newark, which received the Parliamentary franchise by Royal Charter under Charles II., was the last instance of its kind. The House of Commons took the issue of writs into its own hands; and no new borough was created in England or Wales until the Reform Act of 1832. At the date of the Union with Scotland the number of Members was 513. The Act of Union (6 Anne, c. 7) added 45 representatives of that kingdom; and the Act of Union with Ireland in 1800 (39 & 40 Geo. III. c. 67) made a further addition to the House of 100 Irish members. The proportional representation of the three Kingdoms has since been a little varied, Scotland having [,1890, 72 members, and Ireland 103]; but the total number of Members has remained nearly the same. In 1879, owing to the disfranchisement of certain boroughs for corrupt practices, it stood at the slightly reduced figure of 650 [,1890, 670].[4]

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[1] *Supra*, p. 401.

[2] *Supra*, p. 384.

[3] Glanville's Reports, cii.; May, Const. Hist. i. 329. In the reign of James I. the Commons, out of favour to popular rights, resolved that every town which had at any time returned members to Parliament was entitled to a writ as a matter of course; and by virtue of this resolution fifteen boroughs regained the Parliamentary franchise under James and Charles I. In 1673 the County Palatine and City of Durham were for the first time admitted to the franchise by Act 25 Car. II. c. 9; and about the same time a Royal charter was granted to Newark, enabling it to return two burgesses to Parliament. Hallam, Const. Hist. iii. 39.

[4] [Since the third edition went to press, considerable changes have been effected in the way of Redistribution of Seats, as well as of extension of the Franchise. The principle of the Redistribution of 1884–5 is described in the *Edinburgh Review*, No. 329, for Jan. 1885, as the 'sub-division of large

Defects of the Representative system.

For some time after its establishment, the Representative system, though never aiming at theoretical perfection, had been practically efficient. The knights of the shire and the burgesses who sat in the Parliaments of the 13th and 14th centuries really did represent the wishes of the great majority of the free inhabitants of the counties and boroughs by whom they were elected. But from the end of the 14th century to the passing of the Reform Act, early in the second quarter of the 19th, the House of Commons, as it gained in numbers, lost more and more in real Representative character. The inequalities in the representation which in course of time naturally grew up, through the simultaneous decay of ancient towns and rise into commercial importance of what had been once mere agricultural villages, were allowed to go on unheeded. Many new boroughs were, indeed, as we have seen, enfranchised by Royal charter between the reigns of Henry VIII. and Charles II.; but they were for the most part places of no special importance or size, and were, in nearly every instance, endowed with the privilege of returning members to Parliament for the express purpose of adding, as nomination boroughs, to the power of the Crown in the House of Commons. In 1653, Cromwell made a statesmanlike effort to remedy the evil by disfranchising many small boroughs, giving members to Manchester, Leeds, and Hali-

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constituencies,' and the 'adoption of single representatives, as far as practicable, for each electoral division.' That a considerable change will be wrought in some respects seems to be beyond question. When we are told in the *Review* cited above, that the 'line of distinction' is effaced, for Parliamentary purposes, between boroughs and counties, we are surely brought face to face with a substantially new state of affairs in the relation of the House of Commons to the Nation. It is said that subdivision will check organisations of the nature of the 'Caucus.' It remains to be seen whether this view is more than an amiable suggestion, by way of comforting those, on either side, who do not like such organisations. It is also said that no disfranchisement of boroughs really takes place under the new Act. The *Edinburgh Review* (*loc. cit.*), alluding to the 'disfranchisement, as it is termed,' of 79 boroughs returning 88 members, says, 'these boroughs are not in reality disfranchised at all; they are united to electoral divisions of the vicinity, which will increase their importance, and receive from the principal towns a local name.' This may seem a somewhat curious mode of increasing the importance of a borough constituency. The total number of members to be returned to the House of Commons under the new legislation has been raised to 670.—ED.]

fax, and increasing the number of County members; but his reforms, though characterised by Clarendon as 'a warrantable alteration, and fit to be made in better times,' were cancelled at the Restoration; and thenceforth, until the reign of George III., there was no further attempt to check the ever-growing abuses of the Representative system. That system had become thoroughly venal and corrupt. Most of the English boroughs—with a suffrage generally restricted to close corporations or to those bodies and their nominees, the freemen [1]—might be roughly divided into those which were sold by their 'patrons,' the great territorial proprietors, and those which sold themselves. Of the remainder, while many were under the influence of the Crown, and obediently returned the Crown's nominees, others were owned by patrons who exercised their powers of nomination honestly and conscientiously, and did a service to the country by introducing into the House of Commons young men of ability and promise, who, lacking money or connexions, could not otherwise have found a seat. But the great majority of boroughs were venal.[2] Both the Crown and

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[1] *Supra*, p. 364.

[2] [How late this venality lasted is shewn by incidental descriptions of Election proceedings as late as 1826, in the *Life of Lord Campbell*, by Hon. Mrs. Hardcastle, i. 432, describing the poll for Stafford when the seat was contested, and Lord Campbell wrote of himself as 'defeated but not disgraced.' The electors polled alphabetically, and when letter N was got through, Campbell was only six behind. 'Now,' he writes to his brother George, 'began the struggle of corruption. You know that every vote given against me was to be paid for after the election, but Benson (one of the candidates) would not trust to this. He sent his agents about the town, openly offering money to be instantly paid to those who would turn from me.' Again, on p. 435, speaking with reference to an election at Weymouth, Lord Campbell says, 'When we harp upon the defects of the Reform Bill, we are too apt to forget the abuses which it has corrected.' Referring to the same subject, and to the case of Stafford, Lord Campbell writes, *Life*, p. 514, 'If the laws (on Bribery and Corruption) remain as they are, there will be more corruption than ever at such a place as Stafford; for this being the only class of boroughs which may be bought, the price is likely to rise enormously.' The titles to a vote in boroughs before the passing of the Reform Bill were sometimes most extraordinary, and obviously gave great facilities for the creation of what have in recent times been called 'faggot votes.' Thus Lord Campbell tells us that at Weymouth, in 1826, 'the chief right of voting was in the title to any portion of certain ancient rents within the borough, and several voted as entitled to an undivided twentieth part of sixpence. The conveyances to these qualifications were to be strictly investigated, long arguments were addressed to the returning officer, and the decision of a single vote . . . sometimes lasted a whole day.' *Life*, i. 435.—ED.]

the Ministers of the day, either acting in unison, or, as was frequently the case under George III., in opposition to one another, bought seats alike of patrons and constituencies—titles, pensions, or hard cash satisfying the varying wants of all. The market for seats was further enlarged and their price enhanced by the competition of rich traders, more especially of the 'Nabobs,' who had returned from the Indies with immense fortunes, and who anxiously sought entrance into the House of Commons as the avenue to social distinction or extended commercial advantage. The published correspondence and memoirs of men of the time attest the wholesale and unblushing bribery and barter of boroughs which prevailed. A few typical instances will serve as illustrations. In 1767, the borough of Ludgershall was sold by its proprietor, George Selwyn, for £9000.[1] In 1807, £10,000 was offered for the two seats of Westbury, but was refused as inadequate by the trustees for the creditor of the late proprietor, Lord Abingdon.[2] Sales by patrons were generally passed over without animadversion, but some of the attempts of corporations or constituencies to sell the seats at their disposal excited occasional indignation, and received a mild measure of punishment. In 1768, the Corporation of Oxford took advantage of the General Election to demand of the sitting Members, Sir Thomas Stapleton and the Hon. Robert Lee, as the consideration for returning them again, the sum of £5760, which was required to pay off the municipal debts. The request was not only refused, but reported to the House of Commons, who committed the Mayor and ten of the Aldermen to Newgate, whence they were soon discharged after a reprimand from the Speaker. But with a sturdy determination to pay the Corporation debts out of any other pockets rather than their own, the worthy Mayor and Aldermen, while still in Newgate, completed a sale of the two seats, already partly negotiated, to the Duke of Marlborough

[1] Letters of Lord Chesterfield to his Son, iv. 269.
[2] Life of Sir Samuel Romilly, ii. 200.

and the Earl of Abingdon; while the Town-clerk carried off the corporation books so as to prevent any evidence of the transaction from becoming public.[1] But perhaps the political morality of the times may be best exemplified by the borough of Sudbury, which without any hesitation or attempt at decent disguise, shamelessly advertised itself for sale to the highest bidder.[2]

In the larger boroughs and seaports the Government not only had recourse to money-bribes, but ensured the return of their candidates by the wholesale distribution of appointments in the Customs and Excise. In 1782, when Lord Rockingham carried a measure for the disfranchisement of revenue officers, no less than 11,500 were found to be electors, and 70 elections were said to depend mainly on their votes.[3]

The County constituencies of forty-shilling freeholders, although limited and unequal, were less corrupt and more independent than the voters in Boroughs; but they were practically at the disposal of the great nobles and local landowners. Their exclusive possession by the territorial aristocracy was further protected by the enormous expense of a contest, which, in one instance, that of Yorkshire, in 1807, amounted to no less a sum than £200,000, as the joint expenses of two rival candidates, Lord Milton and Mr. Lascelles.[4]

Scottish representation.

The representation of the Scotch counties and boroughs was in even a worse condition than the English. In every Borough in Scotland the franchise was vested in a self-elected corporation; while the County franchise belonged exclusively to the owners of feudal 'superiorities,' of the

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[1] Cobbett's Parl. Hist. xvi. 397–402; Horace Walpole, Memoirs of Geo. III. iii. 153.

[2] Horace Walpole, Mem. of the Reign of Geo. III. i. 42.

[3] Cobbett's Parl. Hist. xxiii. 101. Lord Rockingham said, in one borough having 500 voters, 120 had been appointed to places under Government, through the influence of one of their number who happened to be a friend of the First Lord of the Treasury. *Ibid.* The electoral disabilities of revenue officers, no longer necessary in the enlarged constituencies created by the Reform Act of 1867, were removed by 31 & 32 Vict. c. 73 and 37 and 38 Vict. c. 22.

[4] Life of Wilberforce, iii. 335.

annual value of £400, who were not necessarily either land owners or residents in their counties. With a population of over 2,000,000, the total number of Scotch County electors in 1823 was under 3000; one county, Cromarty, having only nine. It was stated by the Lord Advocate in 1831, that at an election then within living memory, for the county of Bute—which had not more than twenty-one electors, of whom but one was resident—that resident, together with the Sheriff and the returning officer, constituted the meeting; and having taken the chair, moved and seconded his own nomination, put the question to the vote, and elected himself.[1]

Irish representation.

In Ireland, most of the Boroughs, from causes similar to those which affected the Boroughs of England and Scotland, were equally subject to the patronage of noblemen and landowners. The Counties possessed, indeed, a comparatively popular constituency, composed of the forty-shilling freeholders, whose numbers had been multiplied alike by the action of the Irish land laws and of the Protestant landowners who favoured subdivision with a view to extending their political influence. But though relatively far more numerous than the English County electors, the Irish peasant proprietors were also far less independent; so that the Union with Great Britain in 1801 served only to add to the united Parliament a further mass of nominee members.[2]

In 1793, when the members of the House of Commons numbered 558, a majority of 354 was nominally returned by 'less than 15,000 electors,' but in reality on the nomination or recommendation of the Government and 197 private

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[1] Hansard, vii. 529; May, Const. Hist. i. 303. [In the *Edinburgh Almanack* for 1813 (Oliver & Boyd), there are eighteen freeholders on the Roll for Buteshire, and twenty-four for Caithness-shire, the Commissioners for those shires being returned alternately before 1832. No mention is made of this story in the *History of the County of Bute*, by J. Eaton Reid, Glasgow, 1864. In Allen's *Royal Prerogative*, 1849, the story is told, in a letter from Sir James Gibson-Craig, Bart., of the Sheriff of Bute, afterwards Lord Bannatyne, who was raised to the Scottish Bench in 1799, as the 'only freeholder present.'—Ed.]

[2] Wakefield, Statistical and Political Account of Ireland, ii. 299; Oldfield, Representative Hist. vi. 209 *et seq.*; May, Const. Hist. i. 359.

patrons.[1] The Union with Ireland in 1801 added 100 Members to the House, of whom 71 were nominated by 56 individuals. In 1816, Dr. Oldfield, in his 'Representative History,' gave elaborate details showing that, of the 658 members, 487 were then returned by the nomination of the Government and 267 private patrons, of whom 144 were Peers.[2] Well might the younger Pitt exclaim: 'This House is not the representative of the people of Great Britain; it is the representative of nominal boroughs, of ruined and exterminated towns, of noble families, of wealthy individuals, of foreign potentates.'

Bribery of Members.

A House of Commons thus tainted at its source was peculiarly open to the attacks of political corruption. George III. personally examined the voting list, and awarded honours, places, and pensions, or took means to signify his displeasure, in accordance with the votes of individual Members. The great number of valuable appointments tenable by Members of Parliament operated like prizes in a lottery. 'An interested man,' said Lord Rockingham, 'purchases a seat upon the same principle as a person buys a lottery-ticket.'[3] But direct gifts of money to Members were also freely resorted to by the Ministers. Commenced under Charles II., and continued under William III., this method of 'managing the House of Commons' was reduced to a system during the long tenure of office by Sir Robert Walpole. It continued to flourish during the remainder of George II.'s reign, and under George III. was not only adopted and expanded by Lord Bute, but received a new and most pernicious development in the form of issuing public loans and lotteries on extravagantly easy terms, and rewarding the supporters of the Government by a distribution of the shares, which they were able to sell at once at a high premium.[4] In

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[1] Annual Register for 1793, App. to Chronicle, pp. 83–99.
[2] Oldfield's Representative Hist. vi. 285–300.
[3] Earl of Albemarle's Rockingham Memoirs, ii. 399.
[4] Cobbett's Parl. Hist. xv. 1305; Lord Mahon, Hist. of Eng. v. 20; Lecky, Hist. of Eng. i. 368.

order to carry the preliminaries of the Peace of Paris in Dec. 1762, an office was publicly opened at the Treasury for the bribery of Members, and the sum of £25,000 was afterwards stated by the Secretary of the Treasury to have been expended in a single day in bribes, descending so low as a £200 bank-bill.[1]

Parliamentary reform advocated by Lord Chatham in 1766.

The glaring defects of the Representative system,—the decayed and rotten boroughs the private property of noblemen, the close corporations openly selling the seats at their disposal to Members who in turn sold their own Parliamentary votes, and the existence of great manufacturing cities distinguished by their wealth, industry, and intelligence, and yet possessing no right of sending representatives to Parliament—led Lord Chatham (then Mr. Pitt) as early as 1766 to advocate Parliamentary reform. 'Before the end of this century,' he remarked to the Earl of Buchan, 'either the Parliament will reform itself from within, or be reformed with a vengeance from without.' In the House he denounced the Borough representation as 'the rotten part of our constitution. It cannot continue the century; if it does not drop, it must be amputated.'[2] Ten years later, in 1776, the notorious John Wilkes introduced a comprehensive scheme of reform in a Bill proposing to give additional Members to the Metropolis and to Middlesex, Yorkshire, and other

Wilkes' scheme of reform, 1776.

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[1] Horace Walpole, Memoirs of Geo. III. i. 199. The following remarkable letter from Lord Saye and Sele to Mr. G. Grenville, shows that even to members of the House of Lords money bribes were offered by Ministers without any sense, on either side, of dishonour or insult:

'London, November 26, 1763.

'Honoured Sir,—I am very much obliged to you for that freedom of converse you this morning indulged me in, which I prize more than the lucrative advantage I then received. To shew the sincerity of my words (pardon, Sir, the perhaps over-niceness of my disposition) I return enclosed the bill for £300 you favoured me with, as good manners would not permit my refusal of it, when tendered by you. Your much obliged and most obedient servant,

'SAY AND SELE.

'P. As a free horse wants no spur, so I stand in need of no inducement or douceur to lend my small assistance to the King or his friends in the present Administration.' Grenville Correspondence, iii. 145–146, *n.* [It seems only fair to Lord Saye and Sele to remark that his language does read as though intended to convey a covert rebuke of the proffered 'douceur.'—ED.]

[2] Debates on the Address, Jan. 1766; Cobbett's Parl. Hist. xvi. 100; xvii. 223.

large counties; to disfranchise the rotten boroughs and add the electors to the County constituency; and lastly, to enfranchise Manchester, Leeds, Sheffield, Birmingham, and 'other rich populous trading towns.' 'His scheme, indeed,' remarks Sir Erskine May, 'comprised all the leading principles of Parliamentary reform which were advocated for the next fifty years without success, and have been sanctioned within our own time.'[1] After some further abortive attempts at reform—of which the most noteworthy, on account of its extreme radicalism, was that of the Duke of Richmond, who in 1780 introduced a Bill to establish annual Parliaments, universal suffrage, and equal electoral districts—the subject was taken up by the younger Pitt in 1782 and 1783. On the 7th of May, 1782, when Chancellor of the Exchequer in Lord Rockingham's Administration, Pitt moved for the appointment of a Committee to enquire into the state of the representation. But the motion was rejected by 161 votes to 141. Exactly a year later, on the 7th of May, 1783, being then in opposition to the Coalition Ministry, he submitted three Resolutions affirming (1) the necessity of preventing bribery and expense at elections; (2) the expediency of disfranchising any borough whenever the majority of its voters should be convicted of corruption, and of transferring the unbribed minority to the County constituency; and (3), the desirability of increasing the number of county and metropolitan Members. These Resolutions were however negatived by 293 votes to 149.[2] Two years later, when Prime Minister, Pitt again brought forward the question, this time by moving, on the 18th of April, 1785, for leave to introduce a Bill 'to amend the representation of the people of England in Parliament.' He proposed the disfranchisement of 36 decayed boroughs, and the transfer of their 72 Members to the Counties and the [Capital]—the County constituencies being at the same time enlarged by the admission of copyholders. The

Mr. Pitt's advocacy of reform, 1782–85.

[1] May, Const. Hist. i. 394.
[2] Annual Reg. 1782, Hist. p. 181; 1783, Hist. p. 176.

seats of four other small boroughs were to be obtained by purchase and bestowed upon populous towns; while ten close corporations were to be similarly induced to surrender their exclusive rights for the benefit of their fellow-townsmen. The Bill was, however, purely permissive in character. No boroughs were to be disfranchised unless with the consent of the proprietors; and as compensation to them the sum of £1,000,000 was to be immediately set aside to accumulate at compound interest until it should become an irresistible bait.[1] This extraordinary proposal, which would have committed the State to the recognition of a saleable property in Borough constituencies, was admitted by its author to be 'a tender part,' yet, in his opinion, 'a necessary evil, if any reform was to take place.' But the time was not yet ripe for Parliamentary reform. The House of Commons being indifferent to it, the public generally apathetic, and George III. distinctly adverse,[2] Pitt's Reform Bill was negatived by a majority of 74. The matter was now allowed to drop, and the terror caused by the outbreak of the French Revolution some years later rendered all efforts at reform fruitless.

The question revived after the Peace of 1815.

After the conclusion of the war in 1815 the question of reform was revived. Thenceforward it was again and again brought before Parliament by Sir Francis Burdett, Lord John Russell, and others, until at length, under the Whig Ministry of Lord Grey (who had advocated the cause of reform for forty years), the Reform Bill—after defeats in both Houses of Parliament, a dissolution, the resignation and recall of the Ministry, and a threatened creation of peers by the King,[3] was passed amidst the

Passing of the Reform Act of 1832.

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[1] Annual Reg. 1784-5, p. 189, and Spencer Walpole, Hist. of Eng. ii. 263.

[2] Pitt having written to the King insinuating a fear lest the personal influence of the Crown should be employed to defeat the measure, George replied that 'out of personal regard,' he would 'avoid giving any opinion to anyone on the opening of the door to parliamentary reform, except to him;' but that he had 'ever thought it unfortunate that he [Pitt] had early engaged himself in this measure.' Tomline, Life of Pitt, (4th ed.) ii. 40.

[3] *Supra*, p. 749. [Cf. also Ed.'s *n.* 4, p. 742, for the Duke of Wellington's view of the threatened creation.—Ed.]

greatest popular excitement, and became an Act on the 7th of June, 1832.

Its principal provisions.

By this statute—'the Great Charter of 1832,' as it has been deservedly called—56 nomination or rotten Boroughs, with less than 2000 inhabitants, and returning 111 Members, were swept away.[1] Thirty Boroughs, having less than 4000 inhabitants, lost each a Member, and two more were taken from Weymouth and Melcombe Regis. In this way 143 seats were obtained for distribution among the towns and counties requiring additional representation. Forty-three new Boroughs were created, 22 of which, including metropolitan districts, received the privilege of returning two Members, and 21 one Member each. The number of County Members for England and Wales was increased from 95 to 159, the larger counties being divided, and a third Member being assigned to other important County constituencies. All narrow rights of election were set aside in Boroughs, and a £10 householder qualification (subject to conditions as to residence and payment of rates) was established instead, while the County franchise was extended by the addition to the old forty-shilling freeholders of copyholders and leaseholders for terms of years, and of tenants-at-will paying a rent of £50 a year.[2]

Scotch Reform Act, 1832.

In the same session Reform Acts were passed for Scotland and Ireland. The number of Scotch representatives, fixed by the Act of Union at 45, was increased to 53, of whom 30 were assigned to counties and 23 to cities and burghs. The County franchise was extended to all owners of 'lands, houses, feu duties, or other heritable subjects,'

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[1] [To Mr. Labouchere, M.P., writing on *Democracy in England*, in *Forum*, N.Y., Jan. 1890, the Reform Act of 1832 appears 'A very incomplete measure. . . . In the main the legislature continued to be aristocratic in its composition. Rotten boroughs were swept away, but small and insignificant boroughs still sent members to Parliament. These,' he adds, 'were mostly corrupt,' which seems a somewhat sweeping condemnation of small boroughs after the Reform of 1832. On the other hand, the *Edinburgh Review*, Jan., 1890, Art. *Life of Lord John Russell*, calls it the 'greatest constitutional measure of the nineteenth century.' And, notwithstanding its unavoidably incomplete character, the judgment of the *Edinburgh Review* is most in accordance, it is believed, with the view generally taken.—ED.]

[2] 2 & 3 Will. IV. c. 45.

of the yearly value of £10, and to certain classes of leaseholders, and the Burgh franchise to all £10 householders.[1]

Irish Reform Act, 1832.

In Ireland several rotten Boroughs had been disfranchised at the time of the Union: the right of election was now taken away from Borough corporations, and vested in £10 householders. The qualification for the County franchise had been raised from 40s. to £10 freeholds by a measure[2] passed at the same time as the Roman Catholic Emancipation Act in 1829, and intended as a protection against the influence of the Roman Catholic priests and agitators, who had ousted the Protestant landlords of their political influence over the poorer freeholders. By the present Act large additions were made to the County constituencies by the inclusion of certain classes of leaseholders and of £10 copyholders. The number of Irish representatives, fixed by the Act of Union at 100, was increased to 105.[3]

The Reform Act of 1867.

By the Reform Act of 1867—passed by Lord Derby's Conservative Ministry with the aid of the Liberal majority in the House of Commons—a further extension of the electoral franchise in England and Wales was introduced scarcely less important than that conceded by the Reform Acts of 1832.

The Borough franchise was extended to all householders (subject to one year's residence and payment of poor's rates) as well as to lodgers occupying lodgings of the annual value of £10.[4] The County occupation franchise was reduced to £12; and 33 seats were withdrawn from English boroughs, 25 of which were transferred to English counties, and the remaining 8 to Scotland and Ireland.[5]

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[1] 2 & 3 Will. IV. c. 65.

[2] 10 Geo. IV. c. 8. Repealed by Statute Law Revision Act, 1873.

[3] 2 & 3 Will. IV. c. 88. In 1850 the Irish Borough franchise was extended to householders rated at £8, and the qualification required for the County franchise was also lowered, so as to include the owners of freeholds rated at £5 and occupiers rated at £12 (13 & 14 Vict. c. 69).

[4] *Supra*, p. 366, *n.* 3.

Scotch and Irish Reform Acts, 1868.

[5] 30 & 31 Vict. c. 102. In the following year Reform Acts were passed for Scotland and Ireland, similar to the English Act in principle, but differing

Representation of minorities.

By the same Act a perfectly new principle, that of the Representation of Minorities, was introduced, in a tentative and partial manner, into the representative system. This

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from it in many of their details. In the Scotch counties the ownership franchise was reduced to 'lands and heritages' of the yearly value of £5; and a £14 occupation franchise established. The Scotch boroughs received a household and a lodger franchise. In Ireland no change was made in the County constituencies, but the Borough franchise was further reduced to a £4 rating occupation. 31 & 32 Vict. c. 48; 31 & 32 Vict. c. 49.

The following tabular statement, compiled from the Parliamentary Return issued in May, 1879, shows the total number of electors in the counties, cities and boroughs, and universities of the United Kingdom then on the Parliamentary Register.

Electors of the United Kingdom.

	Counties.	Cities and Boroughs.	Universities.	Grand Totals.
England ...	816,317	1,496,507	13,031	
Wales ...	67,332	66,812		
	883,649	1,563,319	13,031	2,459,999
Scotland ...	92,310	204,142	11,489	307,941
Ireland ...	172,570	55,247	3,472	231,289
Total ...	1,148,529	1,825,708	27,992	2,999,229

In 1868, prior to the operation of the Reform Acts of 1867–8, the total number of electors, in boroughs and counties, of the United Kingdom, did not exceed 1,370,793.

In the session of 1879, the House of Commons consisted of 650 members, returned as follows by the three divisions of the United Kingdom:—

ENGLAND AND WALES.

	Members.	
52 Counties and Isle of Wight	187	
200 Cities and Boroughs	293	
3 Universities	5	
Total of England and Wales . . .	——	485

SCOTLAND.

33 Counties	32	
22 Cities and Burgh Districts	26	
4 Universities	2	
Total of Scotland	——	60

IRELAND.

32 Counties	64	
33 Cities and Boroughs	39	
1 University	2	
Total of Ireland	——	105
Total of United Kingdom . .		650

principle had been embodied in Lord John Russell's abortive Reform Bill of 1854, which proposed to assign three Members to certain counties, and other large places, the electors of which were to be entitled to vote for two only out of the three.[1] The city of Manchester, and the boroughs of Liverpool, Birmingham, and Leeds, were now each empowered to return three Members to Parliament; and it was declared (secs. 8, 9) that at a contested election for any county or borough represented by three Members, no person should vote for more than two candidates, nor in the City of London, which has four Members, for more than three candidates.

Suppression of bribery and intimidation at elections.

Since the Reform Act of 1832 the attention of Parliament has been continually directed to the suppression of bribery and intimidation at elections. The measures for this purpose culminated in 1872 in the passing of an experimental Ballot Act (to continue in force till the 31st December, 1880), by which the open nomination of candidates on the hustings was abolished, and voting by secret ballot at both Parliamentary and Municipal elections was substituted for the old English system of open voting.[2]

The Ballot Act, 1872.

Summons, duration, and intermission of Parliament.

The duration and intermission of Parliament have been the subject of important legislative enactments in the period since the Revolution. By the ancient Legal doctrine of the Constitution, Parliament can only be summoned by the King's writ; when summoned its duration was formerly limited by the King's pleasure alone; and on the death of the King who summoned it, it was held to be *ipso facto* dissolved. The Parliament which deposed Richard II. in 1399, was held, by a logical deduction of the Constitutional lawyers of that day, to have ceased

The Parliament of 1399.

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[1] [On the Representation of Minorities, as well as on University Representation, which has also become a question of the day, see *Law Magazine and Review*, No. ccl., for Nov. 1883, and ccli. for Feb. 1884, Art. *University Representation*, by J. Parker Smith, M.A. Cf. also *La Représentation Proportionnelle*. Paris, for a valuable collection of recent studies on this subject. —ED.]

[2] 35 & 36 Vict. c. 33. The Universities were excepted.

to exist when Richard ceased to be King; but as it was not convenient for Henry IV. to summon a new Parliament, an expedient was devised by which, under a transparent legal fiction, the same members who had deposed Richard were assembled again in Parliament under Henry's writs. Nearly three centuries later the Convention Parliament which restored Charles II. was looked on as of doubtful validity because not summoned by the King's writ. The Convention acted indeed as a Parliament, and even passed an Act declaring itself to be 'the two Houses of Parliament, notwithstanding the want of the king's writ of summons, and as if his Majesty had been present in person at the commencement thereof:'[1] but it was deemed needful, or at all events prudent, that all its Acts should be confirmed by the succeeding Parliament summoned in due form. At the Revolution of 1688 legal subtleties, though still potent, were treated with greater boldness and common sense. The Convention Parliament which deposed James II.,[2] and elected William and Mary, passed an Act indeed, like the Convention of 1660, declaring itself to be a legal Parliament, notwithstanding any defect of form in its summons or otherwise;[3] but it was no longer thought necessary that its Acts should be confirmed by another Parliament.[4]

Convention Parliament of 1660.

Convention Parliament of 1688.

We have seen how the King's prerogative of calling Parliament had been limited under Edward II. and Edward III. by statutes requiring annual sessions, and under Charles I. by the Triennial Act, passed by the Long Parliament in 1641.[5] After the Restoration this Act was repealed, in 1664, by the 'Pensionary Parliament' of

Triennial Act, 1641.

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[1] 12 Car. II. c. 1.

[2] *Supra*, p. 675.

[3] 1 Will. & Mary, sess. 1, c. 1.

[4] 'Each of these differences [in the proceedings of 1399, 1660, and 1688] marks a stage in the return to the common-sense doctrine, that, convenient as it is in all ordinary times that Parliament should be summoned by the writ of the sovereign, yet it is not from that summons, but from the choice of the people, that Parliament derives its real being, and its inherent powers.' Freeman, Growth of Eng. Const. p. 131.

[5] *Supra*, pp. 281, 282, 604.

Charles II. (which was prolonged for nearly eighteen years), but it was at the same time provided by the repealing statute 'that Parliament should not be interrupted above three years at the most;'[1] and the Bill of Rights declared in October, 1689, that 'Parliament ought to be held frequently.'[2] Only two months later, in Dec. 1689, a Bill for establishing Triennial Parliaments was introduced in the House of Lords. Dropped at the prorogation, it was reintroduced in 1693, and passed both Houses; but William III. refused his assent. The Commons, however, persevered with the project; and a similar Bill, in the following year, became the Triennial Act of William and Mary, in November, 1694. It provided that a new Parliament should be called within three years after the dissolution of a former one, and the utmost extent of time that any Parliament should be allowed to sit was limited to three years.[3] This continued to be the law for two-and-twenty years. But after the suppression of the Rebellion in 1715, the Whig ministry of George I., still apprehensive of the machinations of the Jacobites, and fearful lest a General Election should endanger the stability of the new dynasty, introduced and carried the Septennial Act of 1716, which extended the period of Parliamentary duration to seven years.[4] It is remarkable that the Bill, although specially affecting the constitution of the Commons' House, was introduced in the House of Lords, its proposer being William, second Duke of Devonshire, whose father had been one of the chief promoters of the Triennial Act of 1694. By passing the Bill without a dissolution, Parliament not only provided for the future, but extended the duration of the existing House of Commons for four years beyond the time for which it had been elected. Such a proceeding, though perfectly legal—for to the authority

Triennial Act, 1694.

Septennial Act, 1716.

[1] 16 Car. II. c. 1.
[2] *Supra*, p. 684.
[3] 6 Will. & Mary, c. 2.
[4] 1 Geo. I. c. 38.

of Parliament there is no limit—had its best justification in the real and pressing danger which then menaced the reigning family. The special emergency might indeed have been met by a temporary measure; but a permanent Act was deemed the safer and more Constitutional course.[1] Moreover, there was much to be urged in favour of a change. 'Ever since the Triennial Bill has been enacted,' said Sir Richard Steele, who supported the Septennial measure in the House of Commons, 'the nation has been in a series of contentions; the first year of a Triennial Parliament has been spent in vindictive decisions and animosities about the late elections; the second session had entered into business; the third session has languished in the pursuit of what little was intended to be done in the second; and the approach of an ensuing election has terrified the members into a servile management, according as their respective principals were disposed towards the question before them in the House.' Although the Bill was strongly opposed by the Tories in both Houses, it passed its third reading in the Commons with a dissentient minority of only 121. Among the most important effects of the extension of the natural duration of Parliaments was a marked increase in the stability and power of the House of Commons, and a strengthening of the influence of the Ministry. Mr. Speaker Onslow declared that the Septennial Act formed 'the era of the emancipation of the British House of Commons, from its former dependence on the Crown and the House of Lords.'[2] The difference between the position of the Lower House under the Triennial and Septennial Systems is, indeed, strongly brought out by the fact that in the

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[1] Lord Mahon, Hist. of Eng. i. 301.

[2] Coxe's Life of Sir Robert Walpole, i. 75. [In *Edinburgh Review*, Jan. 1890, Art. *Democracy in Switzerland*, p. 139, the Reviewer says that 'the Septennial Act saved England from a reaction.' Mr. Labouchere, M.P., on the other hand, writing as the accepted 'leader of the Radical ring of the Liberal party in England,' in the *Forum*, N. Y., Jan. 1890, Art. *Democracy in England*, speaks with some appearance of contempt of the Septennial duration of Parliament as the one thing which keeps the present Administration in power. —ED.]

reign of Anne party leaders, like Harley and St. John, joined the ranks of the Peerage in the very midst of their political careers, while under the Septennial system Sir Robert Walpole designedly confined himself to the House of Commons, and only accepted an earldom from George II. when defeat had closed his long Administration.

Attempts to repeal the Septennial Act.

From the reign of George II. down to the reign of Victoria, various attempts have been made at different times to repeal the Septennial Act, and shorten the duration of Parliaments. The great Earl of Chatham, in 1771, 'with the most deliberate and solemn conviction, declared himself a convert to Triennial Parliaments.'[1] And so recently as 1849, Mr. Tennyson-D'Eyncourt obtained leave to introduce a Triennial Bill by a majority of five. But more recently, as the operation of an extended suffrage has brought the House of Commons into closer and more sympathetic relations with the mass of the people, the popularity of this question has sensibly declined.[2] There is no principle involved in either of the numbers 3 or 7. Any restriction on the duration of Parliaments is but a means to an end—the maintenance of a House of Commons fairly representing the wishes of the Nation, as those wishes periodically change amidst the vicissitudes of Home and Foreign politics. In practice it is found that no Parliament is continued longer than six years;[3] and, indeed, whatever be the legal

[1] Cobbett's Parl. Hist. xvii. 223.

[2] 'It is a remarkable illustration of the changes that may pass over party warfare, that the Republican Milton at one time advocated the appointment of members for life [in his 'Ready and Easy Way to Establish a Commonwealth']; that the Tory Party under Walpole and Pelham advocated triennial, and even annual Parliaments, which afterwards became the watchwords of the most extreme radicals; that the Whigs, taking their stand upon the Septennial Act, contended against the Tories for the greater duration of Parliament; and that a reform which was demanded as of capital importance by the Tories under George I. and George II., and by the Radicals in the succeeding reigns, has at present scarcely a champion in England.' Lecky, Hist. of Eng. i. 450.

[3] Frequent dissolutions have reduced Parliaments, at several periods, to an average duration of three or four years. Sir Samuel Romilly stated, in 1818, that out of eleven Parliaments of George III. eight had lasted six years. But from the accession of William IV. in 1830 to the year 1860, there were no less than ten Parliaments, showing an average duration of three years only. (May, Const. Hist. i. 444.) The Parliament which met on the 31st of May, 1859, was not dissolved till July 6, 1865, exceeding the six years' practical limit by thirty-six days.

limit fixed, the practical limit will necessarily be somewhat less, in order that the Government may retain its freedom of dissolving Parliament untrammelled, and that the inconvenience of a forced dissolution at an untoward moment may be avoided. Should the question be again taken up in earnest, a quinquennial or sextennial limit would probably, on the ground of convenience and efficiency, be found preferable alike to the somewhat excessive prolongation possible under the existing system, and to the inadequacy of the shorter period which it replaced.

Abrogation of old rule that Parliament was dissolved by death of the Sovereign.

The rule that Parliament was *ipso facto* dissolved by the death of the Sovereign was abrogated in Queen Anne's reign by an enactment that the Parliament in being at the time of a demise of the Crown should continue for six months afterwards, unless specially prorogued or dissolved by the new Sovereign.[1] A statute of George III.'s reign further provides, that if the Sovereign should die in the interval between the dissolution of one Parliament and the meeting of a new one, the last preceding Parliament shall *ipso facto* revive and continue in being, unless again dissolved, for six months.[2] The six months' limit imposed by the Act of Anne was abolished by a clause in the Reform Act of 1867, so that now the continuance of a Parliament in being at a demise of the Crown is in no way affected by that event.[3]

Privilege of Parliament since the Revolution.

Prior to the Revolution, privilege of Parliament had been nearly always asserted on behalf of Popular rights and liberties against the arbitrary authority of the Crown.[4] The Revolution established the supremacy of Parliament in the government of the country; but by the time that the House of Commons had become all powerful in the State it was ceasing, as we have seen, to be a real and effective representative of the Commons of England.

Sometimes wielded by the Execu-

Corrupt in itself, and the offspring of narrow and corrupt

[1] 7 & 8 Will. III. c. 15; 6 Anne, c. 7.
[2] 37 Geo. III. c. 127.
[3] 30 & 31 Vict. c. 102, s. 51.
[4] *Supra*, p. 336, *et seq.*

constituencies, its necessary power of inflicting punishment for breach of privilege was placed at the disposal of the Executive for the oppresssion of popular liberty.

tive for the oppression of popular liberty.

In 1714, Sir Richard Steele was expelled the House for writing 'a seditious and scandalous libel' called *The Crisis*, a pamphlet reflecting on the Tory Ministry of Queen Anne as inimical to the Hanoverian succession, In their proceedings against Wilkes in 1763 and following years, the Commons first withdrew the shield of privilege in order to justify a Judicial decision contrary to law and usage, and then, not content with expelling the obnoxious Member, proceeded illegally to deprive the electors of Middlesex of their free choice of a representative.[1] Wilkes had been arrested and imprisoned, in consequence of the publication of the celebrated No. 45 of the *North Briton*, on a 'general warrant,'—*i.e.*, a warrant not specifying any person by name, but directed against 'the authors, printers, and publishers' generally,—signed by Lord Halifax, Secretary of State. Released on a writ of *habeas corpus*, on the ground of his privilege as a member of the House of Commons, the Lower House, eager to second the vengeance of the King, voted the publication, while still the subject of a prosecution in the King's Bench (which Wilkes declared himself ready to meet notwithstanding his privilege), 'a false, scandalous, and seditious libel, tending to excite traitorous insurrections,' and resolved 'that privilege of Parliament does not extend to the case of writing and publishing seditious libels.'[2] Wilkes, having been proved to be the author and publisher of the obnoxious No. 45, was expelled the House, and withdrew to France, an exile and an outlaw. Returned for Middlesex in 1768, he was again expelled;[3] and on his immediate re-election, the House

Expulsion of Sir Richard Steele, 1714.

Proceedings against Wilkes, 1763.

He is expelled the House.

[1] [The same fate, in our own day, practically befell the electors of Northampton, owing to the long series of struggles in Parliament regarding the eligibility of Mr. Bradlaugh, the validity of his self-administered oath, and of any oath taken by a person openly professing that oaths had no sanction for him.—ED.]

[2] Cobbett's Parl. Hist. xv. 1359 *seq.*

[3] On the 25th April, 1768, we find George III. writing to Lord North, then Chancellor of the Exchequer: 'Though entirely relying on your attachment to

Declared incapable of re-election, 1768.

not only expelled him a third time, but resolved that his expulsion rendered him 'incapable of being elected a member to serve in this present Parliament.' Again re-elected by the county of Middlesex, the House declared his return to be null and void; and, on his being once more returned by the county, the House not only declared his election void, but adjudged the seat to Colonel Luttrell, the second candidate, who had received only 296 votes, against 1143 recorded for Wilkes. A profligate demagogue was thus turned into a popular hero and a champion of Constitutional freedom. After a lapse of five years Parliament was dissolved, and to the new Parliament in 1774, Wilkes was again returned for Middlesex. The former intemperate proceedings respecting the Middlesex election, which Lord Camden said had 'given the constitution a more dangerous wound than any which were given during the twelve years' absence of Parliament in the reign of Charles I.,' were at length, in 1782, expunged from the Journals of the Commons, as being subversive of the rights of the whole body of electors in the Kingdom.[1]

The declaration expunged from the Journals of the Commons, 1782.

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my person as well as on your hatred of any lawlesss proceeding, yet I think it highly expedient to apprise you that the expulsion of Mr. Wilkes appears to be highly expedient, and must be effected.' Lord Mahon, Hist. of Eng. v. 227.

Expulsion and disqualification of members.

[1] The right of the Commons to expel a member is undoubted: but since the reversal in 1782 of the proceedings against Wilkes, it has been equally undoubted that expulsion, though it vacates the seat of the expelled Member, does not create any disability in him to serve again in Parliament. In fact, the Commons have no control over the eligibility of candidates, except in the administration of the laws which define their qualification, for one House of Parliament cannot create a disability unknown to the law. [May, Parl. Practice, p. 63, 9th ed.] The question of the disability arising from conviction of treason or felony has been the subject of discussion in the Commons on two or three recent occasions. By the Common Law a person *attainted* of treason or felony was incapable of being elected a member of Parliament (Coke, 4th Inst. 47). But a doubt was at one time entertained whether a person who was not attainted for treason or felony, but was merely convicted, was disqualified. In 1849, a resolution was brought before the House of Commons that Mr. Smith O'Brien, M.P., having been convicted of treason, was ineligible to sit in the House. It was proposed as an amendment that the resolution should run that he was attainted, but the amendment was rejected, and the resolution carried was, that having been *adjudged guilty* of treason, he was ineligible to sit in the House. The next case was that of O'Donovan Rossa, in 1870, who was returned for Tipperary while undergoing sentence of penal servitude for treason-felony. As he had been convicted and sentenced under the Treason-felony Act 11 & 12 Vict. c. 12 (*supra*, p. 408, *n.*) it was contended

Disability arising from conviction of treason or felony.

Smith O'Brien, 1849.

O'Donovan Rossa, 1870.

In the exercise of its power of commitment the House of Commons, on more than one occasion since the Revolution, has been carried by passion beyond the reasonable and customary limits of privilege. In 1721 a printer named Mist was committed to Newgate by the House for printing a Jacobite newspaper which the Commons resolved to be 'a false, malicious, scandalous, infamous, and traitorous libel.' As the offence of Mist could not possibly be interpreted as a contempt of the House, or a breach of its privileges, this proceeding of the Commons was quite as unjustifiable, if not quite so violent, as their treatment of Floyd in the reign of James I.[1] The more recent practice of the House of Commons has been to avoid such excesses of jurisdiction by directing a prosecution by the Attorney-General for offences of a public nature which have been brought to their notice.

Abuse of the privilege of commitment.

Commitment of the printer Mist, 1721.

The right of the Commons to commit for breach of privilege was distinctly recognised by the Judges in the two celebrated cases of the Hon. Alexander Murray

Case of Mr. Alex. Murray, 1751.

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that, not being attainted, there was no disqualification: but the House again rejected the contention, and resolved that O'Donovan Rossa 'having been *adjudged guilty* of felony, and sentenced to penal servitude for life, and being now imprisoned under such sentence, has become, and continues, incapable of being elected or returned as a member of this House.' In order, however, to obviate any doubts as to the legality of this determination, a provision was inserted in the Act which abolished forfeiture and attainder for treason or felony (33 & 34 Vict. c. 23, passed in the same year, 1870) that any person thereafter convicted of those offences should be incapable, while undergoing punishment, of being elected a member of, or sitting or voting in, Parliament, or of exercising any parliamentary or municipal franchise. The proceedings in O'Donovan Rossa's case also established that the House, notwithstanding the Act of 1868 (31 & 32 Vict. c. 125, *supra*, p. 356), reserved in its own hands the power to decide on the eligibility of Members. The next leading case is that of Mr. John Mitchell. In 1848 he was tried for treason-felony, found guilty, and sentenced to 14 years' transportation. After a comparatively short period he escaped from his imprisonment, and after remaining abroad for many years, returned to Ireland in 1874, without having suffered his sentence or received a pardon. In February 1875, he was returned unopposed for Tipperary. On the 18th of February, on the motion of the Premier, Mr. Disraeli, and notwithstanding the expression of several doubts as to the legality of the course proposed to be adopted, the House resolved 'That John Mitchell, returned as a member for the county of Tipperary, having been adjudged guilty of felony and sentenced to transportation for 14 years, and not having endured the punishment to which he was adjudged for such felony, or received a pardon under the Great Seal, has become, and continues, incapable of being elected or returned as a member of this House.'

Act 33 & 34 *Vict. c.* 23 (1870).

John Mitchell, 1875.

[1] *Supra*, p. 547, *seq.*

(brother to Lord Elibank, a noted Scottish Jacobite), in 1751, and of Sir Francis Burdett in 1810. In the course of an enquiry before the House into a contested Westminster election, the High Bailiff complained of Mr. Murray (who had been actively engaged in the election against the Ministerial candidate) for obstructing and insulting him in the discharge of his duty. The Commons decided to hear the parties by counsel, and after ordering Murray to give bail for his appearance from time to time, finally resolved that he should be committed to Newgate, and should receive his sentence on his knees. This humiliating command he steadily refused to obey. 'Sir, I never kneel but to God,' was his haughty reply to the Speaker;[1] and the Commons were obliged to content themselves with ordering that he should be kept under the closest restrictions in Newgate, without pen, ink, or paper, and that no person, not even his servant, should be admitted to him,—a severity which, on account of his ill-health, was soon afterwards relaxed.[2] On suing out his writ of *habeas corpus* in the King's Bench, the Judges unanimously refused to discharge him, on the ground of their want of jurisdiction to judge of the privileges of the House of Commons or of contempts against them.[3] As the authority of the House to commit extends only to the duration of the session of Parliament, Murray soon obtained his liberty, amidst the plaudits of the people, who regarded him as a martyr in the cause of popular freedom. On the first day of the following session a motion was carried for his re-committal; but it was then found that he had withdrawn beyond sea, out of reach of the Serjeant-at-arms.[4]

Case of Sir Francis Burdett, 1810.

In 1810, the Commons having committed to Newgate

[1] Lord Orford, Memoirs of last ten years of the reign of George II., i. 24.

[2] By a standing order of the Commons, in 1772, the offensive custom of requiring prisoners to kneel at the bar of the House was renounced. The Lords, though silently discontinuing the practice, still affect to maintain it, in cases of privilege, by continuing the accustomed entries in their Journals.—May, Const. Hist. ii. 75.

[3] State Trials, viii. 30.

[4] Lord Mahon, Hist. of Eng. iv. 29.

the publisher of an offensive placard announcing for discussion in a debating society the conduct of two Members of Parliament, Sir Francis Burdett denied the authority of the Commons, in his place in Parliament, and enforced his denial in a published address to his constituents. He was himself adjudged by the House guilty of contempt, and committed to the Tower by the warrant of the Speaker, but not until the aid of the military had been called in to overcome his forcible resistance. He then brought actions for redress against the Speaker and the Serjeant-at-arms. The Commons, instead of treating these actions as a contempt of their authority, wisely directed the Speaker to plead and submit himself to the jurisdiction of the Court. In the result the Court of King's Bench, and, on appeal, the Exchequer Chamber and the House of Lords, successively upheld the authority of the House.[1]

Publication of Debates.

Of all the privileges of Parliament, the one which has undergone the greatest modification, and of which the practical abandonment has produced the most momentous political results, is that which concerns the secrecy of its proceedings.

Motives for secrecy.

The original motive for secrecy of debate was the anxiety of the Members to protect themselves against the action of the Sovereign, but it was soon found equally convenient as a veil to hide their proceedings from the constituencies. 'To print or publish the speeches of gentlemen in this House,' said Mr. Pulteney in 1738, 'looks very like making them accountable without doors for what they say within;'[2] and it was only after a prolonged struggle that the right of the electors, and of the public at large, to know what the representatives of the Nation were doing in Parliament was at length virtually conceded.

The 'Diurnal Occurrences of Parliament,' 1641–1660.

The Long Parliament, in 1641, had permitted the publication of its proceedings in the 'Diurnal Occurrences of

[1] Ann. Register for 1810, p. 344; Hansard, Deb. xvi. 257, 454; and May, Const. Hist. ii. 76.
[2] Cobbett's Parl. Hist. x. 806.

Parliament' (which continued until the Restoration), but prohibited the printing of speeches without leave of the House. For printing a collection of his own speeches, without such leave, Sir E. Dering[1] was expelled the House and imprisoned in the Tower, and his book was ordered to be burned by the common hangman.[2] The prohibition was continued after the Restoration; but in 1680, to prevent inaccurate accounts of the business done, the Commons directed their 'votes and proceedings,' without any reference to the debates, to be printed under the direction of the Speaker.[3] Thenceforward till the Revolution, we are almost entirely indebted for our knowledge of the Parliamentary debates to the private memoranda and letters of members, which have since been published. Andrew Marvell, member for Hull, sent regular reports to his constituents during the eighteen years from the Restoration to 1678. Anchitell Grey, who represented Derby for thirty years, took notes of the debates from 1667 to 1694, which were published, nearly a hundred years afterwards, in 1769. Locke, indeed, at the instigation of Shaftesbury, ventured, in 1675, to write and publish a report of a debate in the House of Lords, under the title of 'A letter from a Person of Quality to a friend in the Country;' but the Privy Council ordered it to be burnt by the hangman. Debates were also frequently published anonymously in news-letters and pamphlets. After the Revolution frequent Resolutions were passed by both Houses, from 1694 to 1698, to restrain 'news-letter writers' from 'intermeddling with their debates or other proceedings,' or 'giving any account or minute of the debates.' But notwithstanding these Resolutions, and the punishment of offenders, privilege was unable to prevail against the

Votes and proceedings ordered to be printed, 1680.

Debates published anonymously in news-letters,

[1] [This was Sir Edward Dering, of Surrenden Dering, 1st Bart. (cr. 1626), Lieutenant of Dover Castle, the head of an ancient Kentish house, and 'a man of talents and learning,' as he is described in the account of the family in Burke's *Peerage*.—ED.]

[2] Comm. Journ. ii. 411 (Feb. 2, 1641).

[3] Comm. Journ. ix. 74.

craving for political news natural to a free country; and from the accession of the House of Hanover imperfect reports of the more important discussions began to be published in Boyer's 'Political State of Great Britain,' the 'London Magazine,' and the 'Gentleman's Magazine,' under the title of the 'Senate of Great Lilliput,' or the 'Political Club,' and with either simple initials, or feigned names for the speakers. The difficulties of reporting when notes had to be taken by stealth and the memory was mainly trusted to, naturally led to serious inaccuracies, which were often aggravated by intentional misrepresentation. Dr. Johnson, who wrote the Parliamentary reports in the 'Gentleman's Magazine' from November, 1740, to February, 1743, is said to have confessed that 'he took care that the Whig dogs should not have the best of it.'[1] In a debate on the subject in 1738, initiated by Mr. Speaker Onslow, Sir Robert Walpole humorously complained of the misrepresentation to which Members were subjected. 'I have read some debates of this House,' he said, 'in which I have been made to speak the very reverse of what I meant. I have read others of them wherein all the wit, the learning, and the argument has been thrown into one side, and on the other nothing but what was low, mean, and ridiculous; and yet, when it comes to the question, the division has gone against the side which upon the face of the debate had reason and justice to support it.'[2] Later reporters, moreover, too often indulged in offensive and scurrilous nick-names.

and magazines.

Complaints of unfairness.

In 1771 notes of the speeches were published in several journals, accompanied, for the first time, with the names of the speakers; and Col. George Onslow, member for Guildford, and a nephew of the late Speaker, who had been provoked by the opprobrious terms applied to him by some of the reporters, precipitated a conflict between

Contest with the printers, 1771.

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[1] See Dr. Johnson, Life of Cave; Nichols, Literary Anecdotes; Hunt, Fourth Estate, and May, Const. Hist. ii. 37.

[2] Cobbett's Parl. Hist. x. 810.

the House and the press by making a formal complaint of several journals 'as misrepresenting the speeches and reflecting on several of the members of this House.' Certain printers were in consequence ordered to attend the bar of the House. Some appeared and were discharged, after receiving, on their knees, a reprimand from the Speaker. Others evaded compliance; and one of them, John Miller, who failed to appear, was arrested by its messenger, but instead of submitting, sent for a constable and gave the messenger into custody for an assault and false imprisonment. They were both taken before the Lord Mayor (Mr. Brass Crosby), Mr. Alderman Oliver, and the notorious John Wilkes, who had recently been invested with the aldermanic gown. These Civic magistrates, on the ground that the messenger was neither a peace-officer nor a constable, and that his warrant was not backed by a City magistrate, discharged the printer from custody, and committed the messenger to prison for an unlawful arrest. Two other printers, for whose apprehension a reward had been offered by a Government Proclamation, were collusively apprehended by friends, and taken before Aldermen Wilkes and Oliver, who discharged the prisoners as 'not being accused of having committed any crime.' These proceedings at once brought the House into conflict with the Lord Mayor and Aldermen of London. The Lord Mayor and Alderman Oliver, who were both Members of Parliament, were ordered by the House to attend in their places, and were subsequently committed to the Tower. Their imprisonment, instead of being a punishment, was one long-continued popular ovation, and from the date of their release, at the prorogation of Parliament shortly afterwards, the publication of debates has been pursued without any interference or restraint.[1]

[Further contest] with the Lord Mayor and Aldermen of London.

The Lord Mayor (Brass Crosby) and Alderman Oliver committed to the Tower.

Reporting still a breach of privilege.

Though still in theory a breach of privilege, reporting is

[1] Cobbett's Parl. Hist. xvii. 59–163.

now encouraged by Parliament as one of the main sources of its influence—its censure being reserved for wilful misrepresentation only. But reporters long continued beset with many difficulties. The taking of notes was prohibited, no places were reserved for reporters, and the power of a single member of either House to require the exclusion of strangers was frequently and capriciously employed. By the ancient usage of the House of Commons any one Member by merely 'spying' strangers present could compel the Speaker to order their withdrawal without putting the question. This power was exercised in 1849, and, after an interval of twenty-one years, in 1870. Its subsequent enforcement in 1872, 1873, and in later years, caused considerable inconvenience, and at length in 1875, the House was induced to adopt a modification of the rule. By a Resolution, passed in May of that year, while leaving the personal discretion of the Speaker unfettered, he was directed that whenever the presence of strangers should be brought to his notice by a Member, he should, forthwith, without any debate or amendment, put the question of their withdrawal for the decision of all the Members present. Although not made a Standing Order, this Resolution, in the absence of further instructions from the House, has since been acted on by the Speaker in every case which has subsequently arisen.

Exclusion of strangers.

Resolution of the House, 1875.

After the destruction of the Houses of Parliament by fire in 1834, separate galleries were assigned for the accommodation of reporters, and in 1845 the presence of strangers in the galleries and other parts of the House not appropriated to Members was for the first time officially recognised in the Orders of the House of Commons. The daily publication of the Division lists as part of the proceedings of the House,—which alone was wanting to complete the publicity of its proceedings and the responsibility of Members, was not adopted by the Commons until 1836, an example which was only followed by the Lords in 1857. Previously it had been impossible to ascertain, in the great majority of cases, what Members were present

Facilities afforded for reporting.

Publication of division lists.

at a division and how they voted, the Houses themselves taking no cognisance of names, but only of numbers. On questions of great public interest, the exertions of individual members usually secured the publication of the names of the minority, and this practice—notwithstanding it was declared by the House of Commons in 1696 to be a breach of privilege 'destructive of the freedom and liberties of Parliament'—was persisted in, and latterly a list of the majority was also similarly published. The official daily publication of the Division lists was followed up by the adoption by the Commons, in 1839, and by the Lords in 1852, of the practice of publishing the names of Members serving on Select Committees, with the questions addressed by them to witnesses; and a few years previously, in 1835, the Commons admitted the public into 'community of knowledge as well as community of discussion' by directing all Parliamentary reports and papers to be freely sold at a cheap rate.

Publication of Parliamentary reports and papers.

Political results of reporting.

'The entire people,' it has been well observed, 'are now present, as it were, and assist in the deliberations of Parliament. An orator addresses not only the assembly of which he is a member; but, through them, the civilized world. His influence and his responsibilities are alike extended. Publicity has become one of the most important instruments of parliamentary government. The people are taken into counsel by Parliament, and concur in approving or condemning the laws, which are there proposed; and thus the doctrine of Hooker is verified to the very letter: "Laws they are not, which public approbation hath not made so."'[1]

Conflict between the Commons and the Courts of Law as to publication of papers affecting character.

The revolution which has taken place since the 18th century in the relations between the House of Commons and the people, is forcibly brought out by the conflict which occurred in 1836 between the House and the Courts of Law consequent upon the publication of the Parliamen-

[1] May, Const. Hist. ii. 53.

tary reports and proceedings. In 1771 we have seen the Commons in conflict with the magistrates of London to uphold the privilege of the inviolable secrecy of the proceedings of the House; in 1836 the object of their contention with the Courts of Justice was the privilege of publishing all their own papers for the information of the nation. Certain reports of the Inspectors of Prisons, printed by Messrs. Hansard in obedience to the orders of the House of Commons, contained severe animadversions on a book written by a Mr. Stockdale, who thereupon brought an action for libel against the printers. It having been proved that the book was of an indecent character, a verdict was given for the defendants on a plea of justification; but Lord Chief Justice Denman, before whom the cause was tried, observed incidentally that 'the fact of the House of Commons having directed Messrs. Hansard to publish all their parliamentary reports, was no justification for them, or for any bookseller who publishes a parliamentary report containing a libel against any man.' This denial of Parliamentary privilege was met by a declaration of the Commons that the power of publishing their proceedings and reports was 'an essential incident of the constitutional functions of Parliament,' and that any person instituting a suit as to, or any Court deciding on, a matter of privilege contrary to the determination of either House, would be guilty of a breach of privilege. Stockdale at once proceeded to bring other actions, and on the issue whether the printers were justified by the privilege and order of the House, the Court of Queen's Bench unanimously decided against them.[1] The Sheriffs levied the amount of damages, and the House vindicated its privileges by committing Stockdale and his attorney Howard, and also the Sheriffs.[2] While in prison, Stockdale repeated his offence by bringing other actions, for which his attor-

Stockdale v *Hansard*, 1839.

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[1] *Stockdale* v. *Hansard*, 9 Ad. & E. 1 (1839), [Denman's Broom's *Const. Law*, p. 875, and Note, p. 968.]

[2] Case of the *Sheriff of Middlesex*, 11 Ad. & E. 273 (1840); [Denman's Broom's *Const. Law*, p. 961.]

ney's son and clerk were committed; and the deadlock was at length only removed by the passing of an Act of Parliament providing that all such actions should be stayed on the production of a certificate or affidavit that the paper complained of had been published by the order of either House of Parliament.[1] The right of a newspaper to publish a fair and faithful report of the debates and proceedings in Parliament without any authorisation from either House, was determined in 1868 by the decision of the Court of Queen's Bench, in *Wason* v. *Walter*, that no action for libel would lie against the proprietor of the 'Times' for so doing.[2]

Right of Parliament to publish established by Act 3 & 4 Vict. c. 9.

Wason v. *Walter*, 1868.

IV. Growth of Religious Liberty.

(IV.) Toleration and growth of Religious Liberty.

Protestant Nonconformity, fostered instead of being crushed by the very efforts of the Church to enforce unity, had gained considerably in numbers, organisation, and political weight, during the reigns of the last two Stuarts; and the important services of the Dissenters, in combining with the Church to bring about the Revolution of 1688, were rewarded by the Toleration Act. This famous statute was far indeed from granting religious freedom; it repealed none of the Acts by which conformity with the Church of England was exacted, and left the Civil disabilities of Nonconformists under the Corporation Act of 1661 and the Test Act of 1673[3] intact; but it recognised, for the first time, the right of public worship beyond the pale of the State Church, by exempting from the penalties of

Toleration Act, 1 Will. and Mary, c. 18.

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[1] 3 & 4 Vict. c. 9. Subsequently Stockdale's attorney, Howard, brought two actions against the officers of the House, which, on the grounds of excess of authority and informality in the Speaker's warrant, were given in the plaintiff's favour. But on a writ of error the judgment in the second action was reversed by the Court of Exchequer Chamber. *Howard* v. *Gosset*, 10 Q. B. 352; [Denman's Broom's *Const. Law*, p. 970.]

[2] *Wason* v. *Walter*, 8 Best & Smith, 671. [A still more famous case of Privilege in which *The Times* has been concerned is that which, arising out of the publication in the *Times* of letters affecting Mr. Parnell's conduct in connection with Irish affairs, has recently given rise to a protracted Trial before a Special Commission, as to which cf. *Law Magazine and Review*, No. cclxix., p. 394, for August, 1888.—ED.]

[3] *Supra*, pp. 653-4.

existing statutes against separate conventicles and absence from church, all persons who should take the oaths of allegiance and supremacy, and subscribe a declaration against Transubstantiation. Dissenting ministers were relieved from the restrictions imposed by the Act of Uniformity and the Conventicle Act upon the administration of the sacrament and preaching in meetings,[1] on condition that, in addition to taking the oaths, they signed the 39 Articles, with the exception of three and part of a fourth.[2] Quakers were allowed to make an affirmation in lieu of taking the oaths. All meeting-houses were required to be registered, but when registered their congregations were protected from molestation.[3]

Toleration only partially established.

The principle of Religious Toleration was as yet, however, but imperfectly established.[4] Roman Catholics and Unitarians were specially excepted from the Act, and were soon afterwards subjected to additional penalties. Unitarians were disabled from holding any office ecclesiastical, civil or military:[5] and Roman Catholics were placed under most severe restrictions.[6] In 1700 an Act was passed offering a reward of £100 for the discovery of any Roman Catholic priest exercising the functions of his office, and subjecting him to perpetual imprisonment. By the same Act every Roman Catholic was declared incapable of inheriting or

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[1] *Supra*, pp. 657, 659.

[2] The articles excepted (as expressing the distinctive doctrines of the Church) were Arts. 34, 35, 36, and part of Art. 20.

[3] 1 Will. & Mary, c. 18, confirmed by 10 Anne, c. 2.

[4] [The Scottish Episcopal Church, which was established at the time of the accession of William III., was disestablished, not on account of any theological partialities of William himself, but because of the general adherence of its bishops and clergy, and a considerable portion of the laity, to the cause of the exiled House of Stuart. Heavy penal disabilities were laid on the Episcopalians in Scotland, which were only partially removed in 1792. See *History of Laurencekirk*, by Rev. W. R. Fraser, M.A., Edinburgh, 1880, for the impartial witness of a Presbyterian minister to the pressure of the disabilities; and for evidence of their pressure on even the non-Jacobite members of the Episcopal clergy, see the interesting *Life and Times of Rev. John Skinner of Linshart, Longside* (the well-known author of 'Tullochgorum'), by Rev. W. Walker, M.A., London, 1883. John Skinner was ordained deacon in 1742, and was imprisoned for the use of the same Book of Common Prayer which he would have been deprived for not using in England.—ED.

[5] 9 Will. III. c. 35.

[6] 1 Will. & Mary, st. 2, c. 1.

purchasing land, unless he abjured his religion upon oath, and on his refusal, his property was vested, during his life, in his next of kin, being a Protestant. He was also prohibited from sending his children abroad to be educated.[1]

Temporary reaction under Anne.

Acts against Occasional Conformity and the growth of Schism, 1711 and 1713.

During the Tory ascendancy of the last four years of Queen Anne's reign, serious inroads were made upon the toleration formerly granted to Protestant Nonconformists, more especially by two statutes, the Occasional Conformity Act,[2] and the Schism Act.[3] The former, passed in 1711, was intended to prevent the evasion of the Test Act by occasional conformity on the part of those Dissenters who, while adhering to their own form of worship, did not hesitate occasionally to receive the sacrament according to the rites of the Established Church.[4] The other Act, passed in 1713, for 'preventing the growth of Schism,' was framed in the true persecuting spirit, to deprive Dissenters of the means of educating their children in their own religious beliefs, by crushing all Nonconformist schools, some of which had already attained a certain degree of eminence. These reactionary statutes were, however, both repealed in 1718, under George I.,[5] and from the beginning of the reign

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[1] 11 & 12 Will. III. c. 4; 13 Will. III. c. 6.

[2] 10 Anne, c. 2.

[3] 12 Anne, c. 7.

[4] [This practice, which, as Mr. Minto says, 'had grown up after the Revolution and had attracted very little notice until a Dissenting Lord Mayor, after attending church one Sunday forenoon, went in the afternoon with all the insignia of his office to a Conventicle,' was severely criticised by Defoe in a Pamphlet on *Occasional Conformity*, published in 1698, the year after Sir Humphrey Edwin had given the special cause of offence which attracted public attention and Defoe's wrath. Cf. *English Men of Letters. Defoe.* By W. Minto. Lond. 1879, pp. 19–20. Occasional Conformity, said Defoe, with a certain rigorous logic, was 'either a sinful act in itself, or else his dissenting before was sinful.' Yet when a Bill was subsequently introduced to prohibit Occasional Conformity, Defoe condemned it as a 'breach of the Toleration Act, and a measure of persecution.' The existence of such conflicting views among professed Dissenters may serve to shew the difficulty of framing a Legislation to meet such conflict and at the same time to guard against what were, or were at least considered to be, dangers to the existing Constitution in Church and State.—ED.]

[5] 5 Geo. I. c. 4. In 1697, Sir Humphrey Edwin, Lord Mayor of London, and a Presbyterian, gave great offence to churchmen by going in civic state to a Dissenting Meeting-house. To prevent any repetition of the scandal, the Act of 5 Geo. I. (now repealed by the Statute Law Revision Act, 1871) while repealing the Occasional Conformity Act, enacted that no mayor, bailiff, or

of George II. civil offices were practically thrown open to Protestant Dissenters, by means of the Annual Indemnity Acts passed in favour of those who had failed to qualify themselves under the Corporation and Test Acts.[1] The severe laws against the Roman Catholics, although enforced by a Proclamation of Queen Anne in 1711, by a further Act of Parliament after the Rebellion of 1715,[2] and by another Royal Proclamation after the rebellion of 1745, were also greatly mitigated in practice.

Annual Indemnity Acts under George II.

In 1753, a fresh restriction was imposed upon Dissenters by Lord Hardwicke's Marriage Act,[3] the immediate object of which was to prevent clandestine marriages. Dissenters had previously been allowed to be married in their own places of worship; but by this Act all marrriages, except those of Jews and Quakers, were required to be solemnised in a church, by ministers of the Establishment and according to its ritual.

Lord Hardwicke's Marriage Act, 1753.

It was not, indeed, till the reign of George III., when the Jacobitism of the Roman Catholics had become lukewarm and innocuous, and the preaching of Wesley and Whitefield had stimulated and revived the Dissenting sects, that the gradual relaxation of the religious penal code was commenced in earnest. Early in this reign the broad principles of Toleration were Judicially affirmed by the House of Lords, in the case of the City of London and the Dissenters.[4] 'It is now no crime,' said Lord Mansfield in moving the Judgment of the House, 'for a man to say

Relaxation of religious penal code under George III.

Principle of Toleration upheld by House of Lords in the case of the City of London and the Dissenters, 1767

other magistrate should attend any public meeting for religious worship, other than that of the Church of England, in the gown or with the ensigns of his office, on pain of being disqualified to bear any public office whatsoever.

[1] The first Indemnity Act was passed in 1727. Since then, with a few exceptions, similar Acts were annually passed, until the repeal of the Test and Corporation Acts in 1828.

[2] 1 Geo. I. c. 55.

[3] 26 Geo. II. c. 33.

[4] *Chamberlain of London* v. *Allen Evans, Esq.* The suit, originally instituted in the Sheriff's Court, was for a fine (under a bye-law made in 1748) for refusing to serve as Sheriff, on the ground of disability arising from not having taken the Sacrament, according to the rites of the Church of England, within a year before, as required by the Corporation Act of 13 Car. II. Judgment of the House for the Defendant.

he is a Dissenter; nor is it any crime for him not to take the sacrament according to the rites of the Church of England; nay, the crime is, if he does it contrary to the dictates of his conscience.' 'Persecution for a sincere, though erroneous, conscience, is not to be deduced from reason or the fitness of things; it can only stand upon positive law. The Toleration Act renders that which was illegal before, now legal; the Dissenters' way of worship is permitted and allowed by this Act; it is not only exempted from punishment, but rendered innocent and lawful; it is established: it is put under the protection, and is not merely under the connivance, of the law.' 'There is nothing certainly,' he added, 'more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and injust, more impolitic, than persecution. It is against natural religion, revealed religion, and sound policy.'[1]

Roman Catholics Relief Acts of 1778 and 1791.

Despite the repugnance and opposition to Catholic emancipation of George III., the ignorant bigotry of the masses which culminated in the Gordon riots of 1780, and the generally unsettled temper of Parliament and the country as to the doctrines of Religious Liberty, the penal code, as regards both Roman Catholics and Protestant Dissenters, was gradually, though unsystematically, relaxed. By the Roman Catholic Relief Act of 1778, the precursor of the 'No Popery' Riots under Lord George Gordon in 1780,—supplemented by another Act in 1791,[2] various penalties and disabilities were removed. Priests were no longer subjected to perpetual imprisonment for the performance of their sacred functions; Roman Catholic heirs educated abroad were relieved from forfeiture of their estates to the next Protestant heir; the prohibition to purchase landed property was removed; a modified freedom of worship and education was permitted; and Roman

[1] Cobbett's Parl. Hist. xvi. 313–327.
[2] 18 Geo. III. c. 60, and 31 Geo. III. c. 32.

Catholic Peers, though still barred by the oath of Supremacy from sitting in the House of Lords, were relieved from the banishment from the King's presence to which they had been subjected in 1678.[1]

Statutes relieving Dissenters from religious disabilities.

In 1779, the Dissenting Ministers' Act, relieved Protestant dissenting preachers and schoolmasters from the limited subscription to the Thirty-nine Articles required by the Toleration Act;[2] and a further measure in 1812[3] relieved them from the remaining oaths and declaration required by the latter statute. The following year witnessed the removal of the disabilities under which Unitarians had laboured, by a statute[4] repealing the exception of anti-Trinitarians from the benefits of the Toleration Act, as well as the provisions against them in the Act of 9 & 10 William III. 'for the suppression of blasphemy and profaneness.' The Civil disabilities of Dissenters under the Test and Corporation Acts still remained to be grappled with. These monuments of bygone bigotry were not only unjust to a large and worthy section of the community, but hurtful to the very cause of religion itself by turning the most sacred ordinance of Christianity into 'an office-key, a pick-lock to a place.'[5] As early as 1718 the first Lord Stanhope, anxious, as he declared, to place the Dissenters on a footing of perfect equality with Churchmen, had endeavoured to procure the repeal of the Test Act at the same time that the Occasional Conformity and Schism Acts were abrogated. But owing to the strong opposition, the repeal of the Test Act was deferred to a more favourable opportunity. In 1736, Mr. Plumer brought forward a motion for its repeal, but Walpole, who had for years obtained the support of the Dissenters by holding out the hope of his assistance when an opportune moment should arrive, voted against the motion, which was defeated by a

Their Civil disabilities.

Early attempts at relief.

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[1] 30 Car. II. st. 2.
[2] *Supra*, p. 783.
[3] 52 Geo. III. c. 155.
[4] 53 Geo. III. c. 160.
[5] Cowper, Works, i. 80.

majority of 128.[1] Half a century passed before another attempt was made by Mr. Beaufoy, in 1787, but, though repeated in 1789, his motion was unsuccessful. Mr. Fox was the next to take up the subject, in 1790, yet even his advocacy was impotent to overcome the determined opposition to a repeal. After the lapse of nearly forty years, Lord John Russell, more fortunate than his predecessors, obtained, in 1828, a success for which they had vainly striven. The Civil disabilities of Dissenters were at last swept away by the repeal of the Test and Corporation Acts; the sacramental test previously required as a qualification for civil, military, and corporate offices, being replaced by a declaration, 'upon the true faith of a Christian,' against injuring or disturbing the Established Church.[2]

Repeal of Test and Corporation Acts, 1828.

Roman Catholic Emancipation Act, 1829.

The following year, 1829, witnessed the passing of the Roman Catholic Relief Act. From the date of the Union with Ireland in 1801, the injustice of maintaining the Political disabilities of the Roman Catholics in a United Kingdom of which they formed no inconsiderable a portion of the population, became more and more glaring. But George III. declared that he 'should reckon any man his personal enemy,' who proposed any measure of relief; and during the life of that King the liberal concessions with which Pitt had been anxious to inaugurate the Union,—and the refusal of which was signalised by his resignation of office,—were compulsorily postponed. Under George IV. the question, which was annually contested in Parliament, assumed a graver aspect. The 'Catholic Association,' formed by Daniel O'Connell, kept up a constant appeal to the excited passions of the Irish people, and at length the Tory Ministry of the Duke of Wellington, finding it necessary to choose between concession and civil war, introduced, and with the aid of the Whigs, carried through both Houses, the Emancipation Act of

[1] Lord Mahon, Hist. of Eng. i. 480; ii. 280.
[2] 9 Geo. IV. c. 17.

1829.[1] This measure, to which George IV. was with difficulty induced to give a reluctant and hesitating assent, was tardy indeed, but complete. It admitted Roman Catholics, on taking the oath of allegiance with a repudiation of the doctrine that princes excommunicated by the Pope might be deposed or murdered (instead of the oath of Supremacy and declaration against Transubstantiation and the adoration of the Virgin Mary), to both Houses of Parliament, to all Corporate offices, to all Judicial offices (except in the Ecclesiastical courts), and to all civil and political offices, except those of Regent, Lord Chancellor in England and Ireland,[2] and Lord Lieutenant of Ireland. Additional restraints were, however, imposed by the Act upon the interference of Roman Catholics in Church patronage: Jesuits and monks were prohibited from coming into the realm without licence; and provisions were inserted for regulating the residence of such as were already within the Kingdom.[3]

Repeal of penalties affecting Roman Catholic religion and education.

In 1832 an Act was passed providing that Roman Catholics in respect of their schools, places of worship, and charities, and of property held therewith, and of persons employed about them, should be subject to the same laws as were applicable to Protestant Dissenters.[4] A few years later the policy of according perfect Religious liberty to the Roman Catholics was consummated by the repeal

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[1] [The language of the text scarcely seems to do justice to the real feelings of the Duke, which are shewn in a passage cited from Lord Ellenborough's *Political Diary*, i. 143, in Martin's *Life of Lord Lyndhurst*, p. 250, *n.* 1; 'Cabinet Dinner at the Duke's, and the Duke said he believed there was no one who desired the settlement of the Catholic question more than he did; but he confessed he did not see daylight.' Much the same state of mind, which as Sir Theodore Martin justly says, appears to have been that of the Cabinet, is evident in Lord Lyndhurst's speech on the Bill, of which Sir Theodore says, *loc. cit.*, 'It was obvious throughout the whole of the Chancellor's speech that he was pressed by the difficulty of depriving, upon religious grounds, the majority of the Irish population of their share in the rights and privileges of their fellow-citizens. The perplexities surrounding the whole question were stated with moderation and frankness.' On this subject, as affecting Ireland, cf. also *Law Magazine and Review*, No. cclxv., for Aug., 1887, Art. *Niebuhr on the the State of Ireland*, 1829.—ED.]

[2] The Irish Chancellorship has since been thrown open to all creeds. [Lord O'Hagan was the first Roman Catholic Chancellor, 1868–74.—ED.]

[3] 10 Geo. IV. c. 7.

[4] 2 & 3 Will. IV. c. 115.

of almost all the enactments against them which (though for the most part obsolete) still remained on the Statute book.[1]

Completion of Civil enfranchisement of Dissenters.

A few supplementary measures were still required to complete the Civil enfranchisement of Dissenters. In 1833, Mr. Pease, the first Quaker who had been elected to the House of Commons for one hundred and forty years, was allowed to take his seat on making an affirmation instead of an oath. In the same year Quakers, Moravians, and Separatists, were enabled by statute to substitute an affirmation, in all cases, for an oath.[2]

Jewish disabilities.

The Jews, banished from England under Edward I., had been suffered to return by Cromwell,[3] but were not formally authorised to settle in England until after the Restoration.[4] An Act of James I.[5] passed in 1610, and directed against the Roman Catholics, had the collateral effect of debarring the Jews from the benefits of Naturalisation, by making the reception of the sacrament a necessary preliminary to Naturalisation in all cases. In the interest of trade and colonisation, this requirement was partially relaxed by two subsequent statutes, which (1663) dispensed with the sacramental test in favour of all foreigners who had been engaged in the hemp and flax manufacture, and (1739) of all Jews and Protestant foreigners who had resided seven years continuously in the American plantations.[6] Notwithstanding the political disabilities

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[1] 7 & 8 Vict. c. 102, 9 & 10 Vict. c. 59.

[2] 3 & 4 Will. IV. cc. 49, 82; and see 1 & 2 Vict. c. 77.

[3] [It cannot be doubted that, although their residence here may not have been legally recognised until the Restoration, Jews were practically settled in England long before the time of Cromwell. The fact of the banishment, which has been lately a subject of discussion in *Notes and Queries*, 7th Ser. vii. 215, may be here stated in the words of the author of a *Short English Chronicle*, in *Three Fifteenth Century Chronicles*, Camd. Soc. 1880, ed. by Gairdner, p. 39, inserted in his text before the record for 20 Edw. I., 'This yere the kynge ordeyned that all the Jewes that were dwellinge in this londe shulde be exiled for evir.' Evidence of the value to the Exchequer of Jews in England before the banishment *t.* Edw. I. is given by Mr. Jacobs, *Arch. Rev.*, ii. 1888–9, pp. 396–410.—ED.]

[4] Blunt, Hist. of the Jews in England, p. 72.

[5] *Supra*, p. 695, *n.*

[6] 15 Car. II. and 13 Geo. II. c. 7; Cobbett's Parl. Hist. xiv. 1373; Lecky, Hist. of Eng. i. 262.

attaching to them in England, the number of foreign Jewish settlers continued to increase with the expansion of English commerce; and at length, in 1753, an attempt was made to extend to all Jews applying for Parliamentary Naturalisation the exemption from the sacramental test, already conceded to those who had resided in the colonies, or been engaged in the manufacture of hemp or flax. But the celebrated Jew Bill,[1] by which this very moderate measure of toleration was effected, proved to be in advance of the opinion of the age. 'No Jews! No Jews! No Wooden Shoes!' became the popular cry; and although the Bill, after a fierce opposition in the House of Commons, obtained a fleeting place upon the Statute-book, it raised such a storm of opposition throughout the country, as to necessitate its repeal in the following session.[2] Jews were occasionally admitted to municipal offices, together with Protestant Nonconformists, under cover of the Annual Indemnity Acts; but the declaration 'on the true faith of a Christian,' imposed by the Act 9 Geo. IV. c. 17, while relieving Dissenters from the requirements of the Test and Corporation Acts, had forged new fetters for the Jew. These were removed, so far as regards Corporations, in 1845;[3] and after a lengthened struggle, the only legal obstacle to the admission of Jews to Parliament was also removed, in 1858, by an Act which empowered either House of Parliament, by Resolution, to omit the words 'upon the true faith of a Christian[4] from the oath of Abjuration.[5]

Admission of Jews to Parliament, 1858.

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[1] *Supra*, p. 695, *n.*

[2] Lord Mahon, Hist. of Eng. iv. 35–37.

[3] 8 & 9 Vict. c. 52.

[4] [It may not be without interest to note that Lord Lyndhurst, in 1853 argued, in favour of admitting Jews to Parliament, that these words, which were closely connected with the immediately preceding words 'without mental reservation,' were not directed against the Jews at all, but were originally inserted 'to prevent Roman Catholics from taking the oath under certain mental reserves, which, according to some of their teachers, would save them from being bound by it.' *Life*, by Martin, p. 452.—Ed.]

[5] 21 & 22 Vict. c. 49; 23 & 24 Vict. c. 63. By the 29 & 30 Vict. c. 19, all distinctions between Jewish and other members were removed by the enactment of a new form of oath from which the words 'on the true faith of a Christian' were omitted.

[The first Jewish peer,—*i.e.*, the first person of the Hebrew race raised to

Civil Registration of births, marriages, and deaths, 1836.

Dissenters' Marriage Bill, 1836.

In 1836 a Civil Registration of births, marriages, and deaths was established; and by another Act, Dissenters were permitted to solemnise marriages in their own chapels, registered for that purpose.[1] The grievance complained of by Dissenters with regard to burials (though destined, doubtless, soon to disappear) still continues in the country districts of England, mitigated, however, by the practice of some incumbents who allow Dissenting ministers to perform their own burial service in the parish churchyard; and in populous towns the Dissenters have generally provided themselves with separate burying-grounds and unconsecrated parts of cemeteries. Lastly, in 1871, one of the few remaining disabilities of Dissenters was redressed by the Universities Tests Act, which opened all lay academical degrees and all lay academical and collegiate offices in the Universities of Oxford, Cambridge, and Durham to persons of any religious belief.

Universities Tests Act, 1871.

V. Liberty of the Press.

(V.) Liberty of the Press.

Of the Political privileges of the people acquired or enlarged since the Revolution, we have still to consider the liberty of the Press,—'the guardian and guide of all other liberties,'[2]—and the last to be recognised by the State.

We have seen how freedom of opinion in Religious matters was early restrained by the action of the Church against the Lollard teachers and writers;[3] and soon after the invention of printing in the fifteenth century the press was placed under a rigorous censorship, not only in England but throughout Europe. After the Reformation in England, the censorship of the press passed with the Ecclesiastical supremacy to the Crown. It became a part of the Royal prerogative to appoint a Licenser, without whose *imprimatur* no writings could be lawfully published;

The Censorship.

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the peerage while continuing to profess the Jewish religion,—is Lord Rothschild, cr. 1885.—ED.]

[1] 6 & 7 Will. IV. cc. 85, 86.

[2] Earl Russell, Eng. Con. p. 339.

[3] *Supra*, pp. 426, 428.

and the printing of unlicensed works was visited with the severest punishments. Printing was further restrained by patents and monopolies. The privilege was confined, in the first instance, under regulations established by the Star Chamber in Queen Mary's reign, to members of the Stationers' Company, and the number of presses, and of men to be employed on them, was strictly limited. Under Elizabeth, the censorship was enforced by more rigorous penalties. All printing was interdicted elsewhere than in London, Oxford, and Cambridge; and nothing whatever was allowed to be published until it had first been 'seen, perused, and allowed' by the Archbishop of Canterbury or the Bishop of London, except only publications by the Queen's printer, to be appointed for some special service, or by Law-printers, for whom the license of the Chief Justices was sufficient.[1] Mutilation or death was the penalty of those who dared to print anything which the Judges might choose to construe as seditious or slanderous of the government in Church or State.[2]

The Press under James I. and Charles I.

Under James I. and Charles I., political and religious discussion was repressed by the Star Chamber with the greatest severity.[3] By an ordinance of the Star Chamber, issued in July, 1637, the number of master printers was limited to twenty, who were to give sureties for good behaviour, and were to have not more than two presses and two apprentices each (unless they were present or past Masters of the Stationers' Company, when they were allowed three presses and three apprentices): and the number of letter-founders was limited to four. The penalty for practising the arts of printing, book-binding, letter-founding, or making any part of a press, or other printing materials, by persons disqualified, or not apprenticed thereto, was whipping, the pillory, and imprisonment.

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[1] Ordinances of the Star Chamber for the regulation of the Press in 1585, *supra*, p. 487.

[2] St. 23 Eliz. c. 2. See the cases of Stubbe, Udal, Barrow, Greenwood, and Penry, *supra*, pp. 476, *n.*, 480.

[3] *Supra*, pp. 581–4.

Even books which had been once examined and allowed were not to be reprinted without a fresh license; and books brought from abroad were to be landed in London only, and carefully examined by licensers appointed by the Archbishop of Canterbury and the Bishop of London, who were empowered to seize and destroy all such as were 'seditious, schismatical, or offensive.' Periodical searches, both of booksellers' shops and private houses, were also enjoined and authorised. Yet it was during this inauspicious period that the first newspaper, the *Weekly Newes*, made its appearance, late in the reign of James I.;[1] and after the abolition of the Star Chamber (Feb. 1640-1) tracts and newspapers issued forth in shoals during the contest between the Crown and the Parliament.[2] The Long Parliament, however, while abolishing the Star Chamber, continued the Censorship of the Press; and endeavoured to silence all Royalist and prelatical writers by most tyrannical ordinances, 'to repress disorders in printing,' by which the messengers of the Government were empowered to break open doors and locks, by day or by night, in order to discover unlicensed printing-presses, and to apprehend authors, printers, and others. These proceedings called forth the 'Areopagitica' of Milton, in which he branded the suppression of Truth by the licenser as the slaying of 'an immortality rather than a life,' maintained that 'she needs no policies, no stratagems, no licensings, to make her victorious,' and nobly, but ineffectually, pleaded for 'the liberty to know, to utter, and to argue freely, according to conscience, above all [other] liberties.'[3]

The first newspaper, the *Weekly Newes*. 1623.

The Censorship continued under the Commonwealth.

Milton's *Areopagitica*.

After the Restoration, the entire control of printing was placed in the hands of the Government by the Licensing Act of 1662, which, though originally passed

Licensing Act, 1662.

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[1] The 'Weekly Newes,' May 23rd, 1623, printed for Nicholas Bourne and Thomas Archer.—May, Const. Hist. ii. 240.

[2] More than 30,000 political pamphlets and newspapers were issued from the press during the 20 years from 1640 to the Restoration. They may be seen at the British Museum bound up in 2,000 volumes.—*Ibid.* ii. 241.

[3] Milton, Areopagitica; a Speech for liberty of Unlicensed Printing, pp. 73, 74. [Arber's Reprints.]

only for three years, was continued by subsequent renewals until 1679. Printing was strictly confined to London, York, and the two Universities; the number of master printers was limited, as in the ordinances of the Star Chamber, in 1637, to twenty; and no private person was to publish any book or pamphlet unless it were first licensed—law books by the Lord Chancellor, or one of the chiefs of the Common Law Courts, historical or political books by a Secretary of State, books of heraldry by the Earl Marshal, and all other books by the Archbishop of Canterbury, or the Bishop of London, or by the Chancellor or Vice-Chancellor of one of the Universities.[1] Authors and printers of obnoxious works were hung, quartered, mutilated, exposed in the pillory, flogged, or simply fined and imprisoned, according to the temper of the Judges; and the works themselves were burned by the common hangman.[2] After the Licensing Act had been temporarily suffered to expire in 1679, the twelve Judges, with Chief Justice Scroggs at their head, declared it to be criminal at Common Law to publish anything concerning the Government, whether true or false, of praise or censure, without the Royal license.[3] All newspapers were in consequence stopped; and the people were reduced for political intelligence and instruction to two Government publications, the official *London Gazette*, which furnished a scanty supply of news without comment, and the *Observator*, which consisted of comment without news. In the absence of newspapers, the Coffee-houses became the chief organs through which the public opinion of the [Capital] vented itself, while the inhabitants of provincial towns, and the

The Judges declare it criminal to publish anything concerning the Government.

Unofficial newspapers stopped, 1679.

Their place supplied by the Coffee-houses and News-letters.

[1] 13 & 14 Car. II. c. 33.

[2] See the cases of John Twyn, State Trials, vi. 659: of Keach, *Ib.*, 710: of Harris, Smith, Curtis, Carr, and Cellier, *Ib.* vii. 926–1043, 1111, 1183; and cf. May, Const. Hist. ii. 242.

[3] 'If you write on the subject of government, whether in terms of praise or censure, it is not material; for no man has a right to say *anything* of government.'—*Carr's case*, 1680, State Tr. vii. 929. This monstrous opinion was not Judicially condemned until 1765, by Lord Camden, Chief Justice of the Common Pleas, in the case of *Entick* v. *Carrington*, St. Tr. xix. 1030. [Cf. Case and Notes in Denman's Broom's *Const. Law*, pp. 555, 609.—ED.]

great body of the gentry and country clergy, depended almost exclusively on News-letters from London for their knowledge of political events.[1]

Licensing Act revived, 1685.

At the accession of James II., in 1685, the Licensing Act was revived for seven years, and was thus in force at the Revolution. It was once more renewed in 1692, for one year and until the end of the following session of Parliament; but a further attempt to renew it in 1695 was negatived by the Commons, and thenceforth the Censorship of the Press has ceased to form part of the law of England. It is a noteworthy fact, and a striking example of the predominance of the practical, as contrasted with the theorising spirit in English politics, that this emancipation of the Press—which Macaulay did not hesitate to declare 'has done more for liberty and for civilisation than the Great Charter or the Bill of Rights,'[2] —attracted scarcely any attention at the time; and was justified by the Commons, in conference with the Lords, without any reference to the great principle involved, and solely on questions of detail concerning the abuses and inconveniences incidental to the Censorship.

Finally expired, 1695.

The Press theoretically free, but still subject to restraints.

The Press was now theoretically free; but in practice it was still subject to several methods of restraint. The way in which the summary jurisdiction of Parliament was employed to check the publication of debates has already been referred to, with reference to the privileges of the House of Commons;[3] and the Government also made use of two other means of controlling the press—(1) the Stamp duty on newspapers, and (2) the Law of Libel. Newspapers, however, quickly multiplied when freed from the Censorship, and in the reign of Queen Anne assumed their present form, combining intelligence with political discussion.[4] At the same time the intellectual

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[1] See Macaulay, Hist. Eng. Ch. III. [1861, i. pp. 389-392.]
[2] Macaulay, [Hist. Eng. 1861, iv. 542].
[3] *Supra*, p. 775 *seq.*
[4] The first daily paper, the *Daily Courant*, was issued in 1709.

character of the periodical literature was raised, and its influence widely extended, by the talents of writers like Addison, Steele, Swift, and Bolingbroke.

But the Press soon became the favourite instrument of party warfare, and by its scurrilous language excited a strong feeling of opposition to it among the governing classes. Each party, when in power, endeavoured to crush its opponents by prosecuting as seditious libels all publications which supported the Opposition. The revival of the Licensing Act was even suggested, but dismissed as impracticable; and the Stamp duty on newspapers and advertisements was adopted instead, avowedly for the purpose of restraining the Press generally and of crushing the smaller papers. The first Stamp Act was passed in the 10th year of Queen Anne,[1] and being found efficient both as a check on the circulation of cheap periodicals and as a source of revenue, the stamp was gradually raised to fourpence. At the end of George III.'s reign it was extended, by one of the series of statutes known as the Six Acts,[2] to tracts and other unstamped periodicals which, while professing not to be newspapers, had obtained a wide circulation among the poor as disseminators of political news and dissertations. Evasions of the Stamp Duty were

Stamp Duty on Newspapers.

The *Six Acts.*

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[1] 10 Anne, c. 19.

[2] The Six Acts (60 Geo. III. and 1 Geo. IV. cc. 1, 2, 4, 6, 8, 9) were a batch of repressive measures passed at the instance of the Government, in 1819, in consequence of the disturbed state of the country. By the first (c. 1) the training of persons to the use of arms was prohibited; by the second (c. 2) the magistrates in the disturbed counties were authorised to search for and seize arms; by the third (c. 4) defendants in cases of misdemeanour were deprived of the right of traversing; by the fourth (c. 6), called the Seditious Meetings Act, extraordinary powers were conferred on the Executive, and all meetings of more than 50 persons for the discussion of public grievances were prohibited, except under very stringent conditions; by the fifth (c. 8) the Courts of Law were enabled, on the conviction of a publisher of a seditious or blasphemous libel, to order the seizure of all copies of the libel in his possession or that of any other person specified, and on a second conviction, to punish him with fine, imprisonment, or banishment. The sixth (c. 9) extended the Newspaper Stamp duty to cheap political pamphlets and periodicals, as mentioned in the text. All these Acts were permanent except the Seditious Meetings Act, which was limited to five years, and the Seizure of Arms Act, which expired on the 25th March, 1822. The punishment of banishment inflicted by the Seditious Libels Act was repealed in 1830 by 11 Geo. IV. & 1 Will. IV. c. 73.

The 'Six Acts,' 1819.

frequent, and the State and the contraband press continued at war until after the Reform Act of 1832. In 1833 the advertisement duty, which had been increased under George III., was reduced in amount, and in 1853 was relinquished altogether. In 1836 the stamp on newspapers was lowered to 1*d.*, and in 1855 abandoned. The duty on paper, which had latterly proved a serious stumbling-block in the way of popular education, was swept away in 1861.[1]

Law of Libel.

A far more powerful instrument for the suppression of freedom of discussion than the Stamp Act was the Law of Libel. This was rigorously enforced by the Government under William III. and Anne; but during the reigns of the first two Georges the Press generally enjoyed more toleration, Sir Robert Walpole being indifferent to its attacks, and openly avowing his contempt for political writers of all parties. Shortly after the accession of George III., the nation, taking a keen interest in political affairs, and finding itself unrepresented in a corrupt House of Commons, sought utterance for its opinions in the columns of the Press, which from this time rapidly rose into a formidable political power. A renewed conflict with the Government was the natural result. Lord Bute, the Premier, was driven from power (April 8, 1763) mainly by the criticism of Wilkes in the *North Briton*, and a fortnight afterwards (Apr. 23) the celebrated No. 45 of that journal appeared, commenting in severe and offensive terms on the King's speech at the prorogation of Parliament and upon the unpopular peace of Paris recently (Feb. 10, 1763) concluded. By a strained exercise of prerogative a *General Warrant* was issued for the discovery and apprehension of the authors and printers (not named) of the obnoxious No. 45. Forty-nine persons, including Wilkes, were arrested on suspicion under the General Warrant; and it having been ascertained that Wilkes was the author, an

No. 45 of the *North Briton.*

Apprehension of Wilkes and others on a *General Warrant.*

[1] *Supra*, p. 599, *n.*

information for libel was filed against him in the King's Bench on which a verdict was obtained.[1] Released from prison on the ground of privilege as a member of Parliament,[2] Wilkes brought an action against Mr. Wood, the Under Secretary of State, and obtained a verdict of £1000 damages;[3] and four days afterwards Dryden Leach, one of the printers arrested on suspicion, gained another verdict with £400 damages against the messengers. On a bill of exceptions which was argued before the Court of King's Bench in 1765, Lord Mansfield and the other three Judges pronounced the General Warrant illegal, declaring that 'no degree of antiquity could give sanction to an usage bad in itself.'[4]

Leach v. *Money*, 1765.

General Warrants declared illegal.

In the same year, 1765, an action brought by Mr. John Entick, the suspected author of the 'Monitor, or British Freeholder,' against the messengers who had seized all his books and papers under a *General Search Warrant* from the Secretary of State, was decided against the Government. Lord Camden, Chief Justice of the Common Pleas, determined that such Warrants, which had originated in the practice of the Star Chamber, and had been unjustifiably continued since the expiration of the Licensing Act of Charles II., were absolutely illegal.[5]

Entick v. *Carrington*, 1765.

Seizure of papers under *General Search Warrant.*

The excitement caused by the proceedings against Wilkes and the printers had scarcely subsided, when the prosecutions which followed upon the publication of *Junius's* celebrated Letter to the King in the 'Morning Advertiser' of the 19th December, 1769, forcibly directed the attention of the public to the severe and extended interpretation of the Law of Libel adopted by the Judges since the Revolution. Already, in 1731, on the trial of one

Junius's *Letter to the King*, 1769.

Strained interpretation of the Law of Libel.

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[1] *Rex* v. *Wilkes*, 4 Burr. 2527, 2574.
[2] *Supra*, p. 771.
[3] *Wilkes* v. *Wood*, 19 State Trials, 1153.
[4] *Leach* v. *Money*, 19 State Trials, 1001. [Denman's Broom's *Const. Law*, p. 522 *seq.*—Ed.]
[5] *Entick* v. *Carrington*, 19 St. Tr. 1030; [Denman's Broom's *Const. Law*, p. 555, and Note, p. 609, *seq.*—Ed.]

Franklin for publishing a libel in the *Craftsman*, it had been held that falsehood, though always alleged in the indictment, was not essential to the guilt of the libel, and Lord Raymond positively refused to admit of any evidence to prove the truth of the statements complained of. On the trial of Almon, a bookseller, for selling a reprint of Junius's letter, two other doctrines which excepted libels from the general principles of the Common Law were maintained by the Courts. (1) It was held that the publisher of a libel was criminally liable for the acts of his servants, unless proved to be neither privy nor assenting thereto; and afterwards the Judges decided that exculpatory evidence was inadmissible, and that publication of a libel by the servant was conclusive proof of the criminality of the master. (2) Lord Mansfield laid it down that it was the province of the Judge alone to determine the criminality of a libel, leaving to the Jury to determine merely the fact of publication, and whether the libel meant what it was alleged in the indictment to mean. On the trial of Woodfall, the original publisher of the 'Letter to the King,' the Jury, in order to defeat this interpretation of the law, found the defendant 'guilty of printing and publishing only,'—a verdict which the Court held to be uncertain, necessitating a new trial. Miller and other printers who were subsequently tried for printing the same letter were boldly declared by the Jury to be 'not guilty.'

Trial of Woodfall for publishing the Letter to the King, 1770.

The doctrine held by the Judges in these trials was strongly animadverted upon in both Houses of Parliament; and the rights of Juries in cases of Libel were nobly and eloquently maintained by the advocacy of Erskine in the cases of the Dean of St. Asaph, in 1779, and of Stockdale, in 1789, the latter being a prosecution for publishing what was charged as 'a scandalous and seditious libel' concerning the conduct of the House of Commons in its impeachment of Warren Hastings. At length, in 1792, the ruling of the Judges as to the province of Juries was in effect reversed by Mr. Fox's Libel Act, which declared their right, on any trial or information for Libel, to give

Dean of St. Asaph's case, 1779.

Stockdale's case, 1789.

Mr. Fox's Libel Act, 1792.

a general verdict of guilty or not guilty on the whole matter.[1]

Reactionary period in growth of liberty of opinion, 1792–1832.

But the signal advance made by liberty of opinion during the first thirty years of George III.'s reign was about to receive a decided check. The proceedings of the French revolutionists created a wide-spread terror of Democracy among the great body of the English people, which was aggravated by the extravagance of a small but turbulent body of Social and Political reformers in England itself. With the publication by the Government in 1792, of a Proclamation warning the people against wicked and seditious writings industriously dispersed among them, and commanding magistrates to discover the authors, printers, and promulgators of such writings, began a reactionary period in the growth of the liberty of opinion which cannot be said to have entirely passed away until after the passing of the Reform Act of 1832. During this period, prosecutions of the press abounded; seditious speaking was severely restrained; and the regulation of newspapers frequently occupied the attention of the Legislature. But from the year 1832, at latest, the Freedom of the Press has been completely established. The utmost latitude of criticism and invective has been allowed it in discussing the actions of the Government and of all public men and measures. By Lord Campbell's Libel Act, passed in 1843, the defendant on an indictment or information for a defamatory libel is allowed to plead its truth, and that its publication was for the public benefit; and the harsh extension of the ruling in Almon's case,[2] as to the criminal liability of a publisher for the unauthorised acts of his servants, has been altered by allowing the defendant in all cases to prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on

Freedom of the Press completely established.

Lord Campbell's Libel Act, 1843.

[1] 32 Geo. III. c. 60.
[2] *Supra*, p. 799.

his part.[1] State prosecution for Libel is now as much a thing of the past as the Censorship itself. The policy of repression has been finally discarded; and rulers have at length recognised in practice the truth and wisdom of Lord Bacon's maxim, that the 'punishing of wits enhances their authority; and a forbidden writing is thought to be a certain spark of truth, that flies up in the faces of them that seek to tread it out.'[2]

We have now traced the English Constitution from its germ in the free institutions of our Teutonic forefathers, and have marked the course of Freedom, as it slowly

> "Broadens down from precedent to precedent,"

and has finally assumed that special form of Parliamentary Government under which it is our privilege to live. Amidst the vicissitudes of its growth and development, during the ten centuries spanned by the several dynasties which have ruled us from Egbert to Victoria, its birth-right of freedom has ever been maintained. Even under Tudor autocracy, the external forms of Constitutional government were observed; and the heritage of liberty was thus handed on to the generations yet to come, who were once more to make it all-powerful in the State. The preservation of that heritage has been mainly due to the combination of sturdy independence, reverence for law and order, and practical common sense, which so pre-eminently distinguish the English people. Actuated by this spirit, they have been enabled, under the guidance of some wise and great Sovereigns, and of a long line of illustrious statesmen, to adapt the English Constitution to the varying needs of

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[1] 6 & 7 Vict. c. 96.

[2] On Liberty of the Press see Hunt, Fourth Estate; Andrews, Hist. of British Journalism; Hallam, Const. Hist. iii. 2–6, 166–168; May, Const. Hist. ii. 238–379; Macaulay, [Hist. Eng. 1861, iv. 542–3, 603–9.]

successive ages, while preserving its fundamental principles intact. The retrospect of the crises through which our Constitution has safely passed, and of the dangers which it has triumphantly surmounted, may well enable us to look forward with confidence to a happy solution of the difficulties which perhaps yet await its further development in the Future.

APPENDICES.

A.

FRANK-PLEDGE, OR COLLECTIVE RESPONSIBILITY, IN ENGLAND AND BOHEMIA.

Doubts appear to have crossed the mind of some recent writers respecting the antiquity of this Institution, and its existence in England before the Norman Conquest. These doubts were, I believe, not present to the mind of the author of the present work, and I have as yet seen no adequate reason for altering his language on this point. I am content to leave Langmead's text in harmony with Palgrave and Hallam, and to wait till time shall shew how far the seeming hesitation of Bishop Stubbs is warranted.

It is probable that the Institution is one which cannot be claimed as of Teutonic origin, or peculiar to the Teutonic race. That seems to arise from the fact, which has possibly escaped general notice, of its existence among at least the mediæval Institutions of the Bohemian Kingdom. How far back it may be traceable in this branch of the Slavonic Race, and whether it may also be found in other branches, are points which have probably still to be worked out, though the language used by M. R. Dareste, in analysing the *Codex Legum Slavonicarum* of Jirecek, in the *Journal des Savants* for 1885, would lead to the inference of its existence as a general feature in Slav Customary Law. 'The ancient Bohemian Law,' says M. Dareste, 'does not differ appreciably from that of the other Slav countries.'

The particular text of Bohemian Law in which it appears to us that the Frank-Pledge system, or system of Collective Responsibility emerges, is the following:—'Pour remplacer la solidarité de la famille,' says M. Dareste, *op. cit.*, 1885, p. 419, 'et en attendant que le pouvoir social fût assez fort pour maintenir partout l'ordre et le respect de la loi, on eut recours en Bohême à un moyen qui a été employé en beaucoup d'endroits, mais qui n'a jamais été qu'un expédient; celui de la responsabilité des villages pour les crimes commis sur leur territoire. Si le coupable n'était pas livré par les habitants, chacun d'eux était condamné à payer 200 deniers d'amende. Un décret de l'an

1222 réduit cette amende à 200 deniers à payer collectivement par tout le village. L'amende elle-même disparaît définitivement à la fin du XIIIe. siècle.'

Surely this is, in principle, the same Institution as the *Tenmantale* or *Frithborga* of the *Leg. Edw. Conf.*, and which both Palgrave and Hallam associate with the Anglo-Saxon Polity. That England took the system from Bohemia, or gave it to Bohemia, would be equally remote from probability. But it is quite possible that both Teuton and Slav developed it on parallel lines, without any interpenetration of political ideas. And that is what at present seems to me to be the most probable hypothesis, viewing the system itself as part of the Institutions which were in being at the time of the Norman Conquest, and which William the Conqueror professed not to destroy but to administer as Edgar or Edward had administered them.

B.

THE EARLY HISTORY OF TITHES IN WESTERN EUROPE.

CONSIDERABLE attention has lately been drawn to the question of the origin and history of Tithes, and of their position among the sources of revenue of the Church. Great diversity of opinion is still manifested by historical and other writers, and it will only be possible here to notice the subject briefly, though it seems desirable not to pass it over altogether.

That Pope Gregory the Great formally instructed St. Augustine, in his *Responsiones* (Haddan and Stubbs, *Councils and Eccl. Doc.* iii., 18, 19) to the Archbishop's questions, how the Roman Church provided for the maintenance of the clergy, is certain, and that the division which he laid down was a quadripartite one, *in omni stipendio quod accedit.* Of these portions one was for the Bishop and his *familia*, or household, for hospitality and maintenance; another for the clergy; the third for the poor; the fourth for the repair of church fabrics. This Gregory describes as the *mos sedis apostolicæ.* But for the nascent English Church he recommends the early Christian system, when no one *aliquid suum esse dicebat.* As Augustine's query was raised regarding the disposal of the altar oblations of the faithful, the *stipendium* of Gregory's answer would seem to be, strictly speaking, confined to those offerings, and not necessarily to refer at all to tithes.

But a quadripartite or tripartite division of tithes certainly pre-

vailed generally throughout the Western Empire and Western Church, and it would seem that either that or its successor the tripartite division, when the Bishops gave up their share, on becoming possessed of landed estates, must, according to all analogy, have prevailed in England. At least, the *onus probandi* would appear to rest with those who deny such a division in England.

That the original form of Tithes was that of a voluntary offering scarcely seems to admit of question. That the clergy of the Christian Church pressed the analogy of the Tithes under the Jewish Dispensation is beyond doubt, and that Kings and Emperors legislated in their favour is equally certain. But the alleged establishment of Tithes in England by Ethelwulf's grant is clearly untenable. All that he appears to have done is to have freed a tenth part of his private estate (*terræ meæ : Chart.* A.D. 855) from all secular services, and to have granted such tenth to God and the Blessed Mary, and all the Saints—*i.e.*, as would have been said later, in Frank-almoigne—for the services of prayer and mass. Kemble (*Saxons in Eng.* ii. 484) explains this action of Ethelwulf as a 'useful remedy' devised by him, in his terror at the distresses of wars and the ravages of barbarous and pagan invaders. The charters in which the grants of a tenth are made confessedly offer many marks of doubt and spuriousness. Kemble speaks of all services being discharged, 'except indeed the inevitable three;' but the language of the grant of 855 (Haddan and Stubbs, *op. cit.* iii. 641) expressly lays down that the lands are to be free, *sine expeditione, et pontis constructione, atque arcis munitione.* The grant to Winchester, however, in 854, retains the *trinoda necessitas.*

The writer on Tithes in the *Dictionary of Christian Antiquities* argues against any general recognition of Tithes as payable *jure divino* during the first three centuries of the Christian Era, and says that there appears to be a distinction drawn in the *Apostolical Constitutions* (4th cent.) between the Tithes payable under the Law and the Oblations offered under the Gospel. It has already been noted that the subject of Gregory's *Responsiones* to Augustine was the disposition of the oblations made at the altar, and it may be that voluntary offerings of a tenth were sometimes made in this form.

From the third to the fifth century, the *Dict. Christ. Ant.* shews that there existed only a 'pious opinion' in favour of Tithes, as yet unenforced by any decree of King or Emperor. The same authority seems to accept as genuine the *Exceptiones* of Egbert, Archbishop of York, which mention Tithes in 750, and Blunt and Phillimore (*Book of Church Law*, 1876) and Hardwick (*Church Hist. Middle Ages*, 1861) also accept Archbishop Egbert's *Exceptiones* as part of the English canonical sources for the obligation of Tithes. Bishop Stubbs, however, it would appear, doubts the authenticity and value of the *Exceptiones*, which he seems to con-

sider to be of later origin, and derived from a Continental source. The capitulary of Charles the Great, in 778, of course applied only to the Frankish kingdom. A later capitulary, of 801, is cited by Ducange, which would, if really part of his legislation, be in force throughout the revived Western Empire.

The *Dict. Christ. Ant.* does not decide at what time parochial Tithes were 'separated from the mother church' (*i.e.*, the cathedral) and 'affixed to the parish church.' Selden seems to take it as having been after the Norman Conquest. Mr. Dibdin has an interesting and valuable note on this subject in his recent edition of the late Professor Brewer's *Church of England* (1885), in which he discusses very temperately some of the principal points in the controversy, as connected with the English Church. Bishop Stubbs (*Const. Hist.* i. 227—9) attributes the legal origin of Tithe in England to the Legatine Councils of 787, which he considers to have had the authority of Witenagemots from the fact of the presence of the several Kings and Ealdormen. It has been suggested, in the notes to the present edition, that these Councils were in reality mixed assemblies, and that the Secular and Ecclesiastical portions of their Ordinances ought to be carefully separated. The Cathedral church would seem to have remained the 'normal recipient' of Tithe, as Bishop Stubbs says, at least down to the Norman Conquest, and perhaps later, since it was a Council of Westminster of the year 1200 that first laid down the 'first claim' of the parochial clergy. It seems worth noting, in this connection, that the earliest quotation for 'Dîme' given by Littré, in his Dictionary, *s.v.*, is from a twelfth century French writer. Ducange (*Glossarium.* Paris. Didot. 1840—50), *s.v. Decima*, argues in favour of early legislation on Tithes, citing the second Council of Mâcon, 587, and a Letter of the Bishops of the Province of Tours, written after a Council held in 567, exhorting the faithful *ut unusquisque ad exemplum Abrahæ offerat de suis mancipiis.* This Letter of the Bishops of the Province of Tours is clearly hortatory, and in any case, even were it a part of the Acts of the Council, its force, like that of the decrees of the Council of Mâcon II., could only be that of the Acts and Decrees of a topical Council.

The Council of Mâcon II. was a Burgundian assembly, convoked by Gontran of Burgundy, second son of Clotaire I., and was attended, *inter alios*, by sixteen Bishops who had been deprived of their sees by the Goths. It is easy to understand, therefore, that the financial support of orthodoxy must have been quite as pressing a question with the Fathers of Mâcon as its doctrinal support. Moreover, Gontran detested the Goths, of whom he said that it was 'a shame that the boundaries of those horrible Goths should extend even into Gaul' (Lavallée, *Hist. des Français.* Paris. 1863. i. 127). Force of law was given to the decrees of the Council of Mâcon II. by King Gontran's Letters to

the Bishops and Judges of his kingdom, but his power, of course, could extend no further. Guizot remarks (*Civ. en France.* Brussels. 1839. iii. 343—5) that it is this Council which has the credit of having discussed the question whether woman has a soul, which he explains as having arisen out of the contention of a Bishop that woman ought not to be called 'man'—a contention abandoned by the said prelate on the rest of the Fathers pressing upon him the texts from the Old Testament, 'male and female created He them,' and from the New Testament those in which Christ is called the 'Son of Man.'

The object of the second Council of Mâcon was to strengthen the hands of the clergy at a time when, as its Fathers said, *prævaricatores legum pœne Christiani omnes ostenduntur.* The words importing payment of Tithe are quite in accordance with such views of the state of the Church in Burgundy in the 6th century, since, say the Fathers, referring back to the passage just cited, *Statuimus et decernimus ut mos antiquus a fidelibus reparetur, et Decimas Ecclesiasticis famulantibus ceremoniis populus omnis inferat, quas Sacerdotes aut in pauperum usum, aut in captivorum redemptionem prærogantes, suis orationibus pacem populo ac salutem impetrent.* It will be observed that this division is very different from the ordinary division of Tithes, and that the Decree is based on the assumption that there was an 'ancient custom' which it was desirable, or rather necessary, to 'restore.' But the main object, as in the alleged donation of Ethelwulf, is stated to be to obtain for the Laity the prayers of the Clergy.

It seems not improbable that under the general terms 'ancient custom' and 'oblations of the faithful,' a claim was gradually advanced, as of right, to a payment, which may sometimes have actually amounted to a Tithe, but which was voluntarily made, in the early ages of the Western Church, at the customary times of Liturgical oblation. In the present day, it is apparent from their language that many of the clergy of the Church of England are persuaded that they have a *jus divinum*, not only to the prædial Tithe, or Tithe of Increase, but also to the personal Tithe, or Tithe of Income.

The historical facts brought together in this Note do not appear to the writer to support such a theory.

It has come to the present Editor's notice, in the course of further researches, that Tithe was taken during the Middle Ages from very varied sources, and, *inter alia*, from some which it is difficult to recognise as open to Christian men, and least of all to the Clergy. In 866, the Bishop of Utrecht took Tithe of Wreck, as appears by a contemporary document cited by Benfante, *Il Salvamento e l'Assistenza nel Diritto Marittimo.* Turin. Rome. Florence. Loescher. 1889. p. 21. At the same period the Custumal of Zealand, Ch. X. § 13, cited by the same writer, shews that the Count took all the goods salved. It may be pre-

sumed that the Bishop took his Tithe when he could get it. But that would hardly be satisfactory to clergy who put the duty of giving the Tenth to what they call God's service in so crude a fashion that they tell children that when a child has a half-crown given to it as pocket-money, the sum of threepence out of that 'belongs to God,' which, being interpreted, clearly means that so much should be put into the Offertory of the Church of the Parson inculcating this doctrine, before the child can be allowed to feel that its Alms-giving has begun. For it is very distinctly laid down by Anglican preachers of the Tithe that Charity, or Alms-giving, can only be said to begin after the Tithe has been paid. But it is not at all clear that the Parson laying down this doctrine would be satisfied to know that the duty to God, as he puts it, had been paid at the Mother Church of his Diocese, though it is clear that the Bishop, and not the Parish priest, was the original channel alike for the payment and the distribution of Tithe.

C.

THE CONVOCATIONS OF CANTERBURY AND YORK.

The early history of the Convocations of the Provinces of Canterbury and York, and of their relations with the Great Council of the Nation and subsequently with the Houses of Parliament, must be admitted to be still surrounded with much obscurity. But in view of the important step recently taken in the constitution of what is called a "House of Laymen," as ancillary to the Convocation of the Southern Province, it seems desirable to note briefly such conclusions as the present writer has been able to form on this difficult subject.

To distinguish accurately the relations on the one hand to a Provincial Synod, on the other to the Great Council or Parliament, of the early meetings of what is assumed to have been Convocation, vaguely described as *Congregationes*, &c., would be impossible in the space and time at disposal here. That some, at least, of these meetings were of a mixed character, partly Ecclesiastical, partly Lay, is highly probable. That after the Norman Conquest, assemblies of the Clergy were summoned for the purpose of taxing their own order, and that when so assembled, they often shaded off into purely Ecclesiastical Synods or Convocations, is equally probable. That we can now distinguish all the varying shades of Ecclesiastico-political character which may rightly have attached to such

assemblies seems doubtful, and the discussion of the question would be necessarily lengthy. The ordinary clerical view appears to be that the Convocations are the "Sacred Synod of this Realm," and the "Church of England by Representation." But this language is often used of the Convocation of Canterbury alone, in which case it is clearly inaccurate, since the National Synod, or "Synod of this Realm," must be made up, if at all, of the two Convocations, or Provincial Synods, if such they be, of the Provinces of Canterbury and York. With regard to the claim of the two Convocations, when in communication with each other, to constitute together the "Church of England by representation," as is asserted by the late Rev. J. H. Blunt, in his *Dictionary of Doctrinal and Historical Theology* (2nd ed. 1872), it may be remarked that even as regards the Clergy this "representation" is obviously imperfect, and that as regards the Laity, they would appear, constitutionally, to form no part of Convocation in either Province. It would be, it is apprehended, *ultra vires*, so to affiliate the new "House of Laymen" to the Convocation of Canterbury as to give its members the character of members of Convocation, and it is further apprehended that such action would be unconstitutional, or at least extra-constitutional. The Constitutional theory that Parliament represents the Laity of the Church of England has doubtless suffered very violent shocks, and it may be desirable that it should be altered so as to bring it into closer conformity with actual facts. But, in any case, Parliament has had nothing to do with the creation of the new "House of Laymen." It may be said, perhaps, that the House of Laymen is not attached to the Convocation of Canterbury; but, if so, it is difficult to see of what body it purports to be a "House." The name certainly appears to connote a third House of Convocation, additional to the Constitutional Upper and Lower Houses. It is true, of course, that the Archbishop of Canterbury has, in his opening address to the new "House," affirmed that "the ancient and actual constitution of Convocation undergoes no shade of alteration by the existence of this House." (*Church Review*, 19th Feb., 1886.) But the more this is insisted upon, the greater seems to be the difficulty of ascertaining the precise character and powers of the new "House." The difficulty itself is too new to be as yet much felt by any one. But it is likely to grow with the growth of the House, and it may be noticed that already members of the House of Laymen have protested against the idea that they "merely represent" the Diocesan Conferences. (*Church Review*, *ut supra.*) It is probable that they will ultimately arrive at the honest conviction that they are the "Laity of the Church of England by Representation," just as it is claimed for the two Convocations that, when in communication—a very rare event—they are the "Church of England by Representation." It seems

worth noting that in so far as the House of Laymen has a representative character, its members can only be considered to be representative of the several existing Diocesan Conferences. From the Diocese of Worcester, where no Conference has as yet been assembled, no members have been sent up to sit in the House of Laymen. But it is to be observed that this representation itself is only indirect, since the Diocesan Conferences are themselves only informal, auxiliary assemblies, and not Legally or Ecclesiastically the equivalents of Diocesan Synods. They may pave the way for Synods of the Future, or they may ultimately be retained alongside of Synods, when constituted, as useful bodies for the general discussion of questions of a mixed character, partly Ecclesiastical, partly Social, such as are brought before Church Congresses in this country. That the Lay members of Diocesan Conferences are, in any real sense, representatives of the Laity of their respective Dioceses, the present Editor is unable to see. They are certainly not such representatives as the Lay Delegates sent up to a German, Austrian, or Swiss Old Catholic Synod, and not even so representative as the Lay Delegates sent up to an Old Catholic Congress. In any case, the elective and representative elements in the new House seem to be weak, at their best, and they are still further weakened by the importation of a totally different element, that of nomination, —a certain number of the members of the House of Laymen being nominated by the Archbishop of Canterbury.

It is asserted, on one hand, that the Convocations of the two Provinces are Provincial Synods; but it is admitted, on the other hand, and the admission was made by the present Primate of All England in his opening address to the House of Laymen, that Convocation itself "might unawares cease to exist." Short of the destruction of an entire Church, such a fate could surely not befal a true Synod, though it might conceivably befal a Convocation of Clergy whose original function of self-taxation had ceased to be required of them, as being otherwise provided for. It is, no doubt, true enough that a Synod, whether Diocesan or Provincial, may, through neglect, or the antagonism necessarily existing between Absolutism and Constitutionalism, cease to be summoned for a while, and even for a long while. This has undoubtedly happened in cases known to the present writer in Italy, where he has been personally acquainted with clergy who have told him that no Synod of their Diocese had been summoned within their knowledge, covering at that time nearly half a century. But such historical Synods are only dormant: they have not 'unawares ceased to exist.' A similar dormancy had long befallen the Synodical action of the Church of Utrecht: but a spirit of revival has sprung up, and the long silent Constitutional *Vox Ecclesiæ* has again begun to speak in Holland. It is possible, of course, that the Convocations of Canterbury and York may

combine two characters, and be, in fact, Convocations from one point of view, Synods from another. But this is, to say the least, not clear. It might, however, become a question worth considering whether a real Synod might not be formed, to sit as such, outside the session of Parliament and of Convocation, and with the members of the House of Laymen as Lay Delegates sent up to such Synod. At present, though there is one National Church, that Church has not a National Synod. This deficiency was admitted and regretted by the present Primate of All England, in his address to the House of Laymen, and His Grace at the same time expressed grave and, it is believed, well founded doubts whether the existing historical Convocations of the two Provinces could be so united into one body as to form such a National Synod. It is submitted that the two Convocations could not be so united, without the concurrence of Parliament, and, under present circumstances, it must be considered very doubtful how far such concurrence would be given. It may well be considered an evil that while the Constitutional theory remains the same, and the Bishops in the House of Lords, and the Knights and Burgesses in the House of Commons, are supposed to represent the Clergy and Laity of the Church of England in Parliament, the House of Commons has drifted so far from the position which formerly entitled it to speak for the Laity that the Constitutional theory has become an anachronism. The new House of Laymen will not remove this anachronism, but its institution may be the germ of some much-needed reforms suggested by the Primate in the far-reaching language of his opening address to the House. His Grace admits that the existing constitution of the Convocation of Canterbury itself needs reform, and some may regret that such internal reform had not preceded the institution of the House of Laymen. The present writer, having himself, now some fourteen years ago, witnessed and participated (as *amicus curiæ*) in the deliberations of both Regional and National Synods, in the Christian Catholic Church of Switzerland, in which the Laity were a constituent part of the assembly, by direct parochial election throughout the Church, can only express his hope that the limited and tentative measure of Reform which the year of grace 1886 saw initiated in the English Church, may lead to the careful consideration of the whole question of the real Ecclesiastical status of the Convocations of Canterbury and York, and of the true relation of the Laity to Diocesan and National Synods.

D.

Dr. STANDISH AND CONVOCATION, *t.* Hen. VIII.

The case of Dr. Standish and Convocation, very briefly noticed in the author's text, p. 430, seems worth some further notice here, as illustrating the attitude of the Convocation of Canterbury during the last days of the Mediæval period of English History, alike towards the State and the Clergy.

The question primarily raised was the old and constantly recurring Mediæval claim of the immunity of clerks, *i.e.*, of all persons who had received tonsure, from the jurisdiction of the King's Courts. The right to this immunity, shewn in Court by establishing the clerkly power of reading, was known as benefit of clergy, and the circumstances under which it was claimed at a late period in the Middle Ages are sometimes very curious. Thus in a case recently analysed in the *American Law Review*, as a specimen of the cases in the Year Books, the same party in a cause is found at one time claiming to be a clerk, and at another time claiming to be a knight, and allowed by the Court to substitute the one claim for the other, though not without some delicately caustic remarks *per Curiam.*

Dr. Standish would appear not himself to have raised the point so long at issue between Church and State, as might perhaps be most naturally gathered from Langmead's text, but simply to have given an opinion, when called upon, as one of "divers divines" with whom the King took counsel at Blackfriars, in the matter of the claims put forth by the Abbot of Winchcombe in a sermon at Paul's Cross, denouncing the Act passed 4 Hen. VIII. c. 2, depriving murderers, robbers of churches, and housebreakers, of the benefit of clergy, unless they were in Holy Orders, as against the Law of God and the liberties of the Church. The Abbot further proceeded to assert that all the Lords who were parties to that Act had incurred the censure of the Church, and that all clerks who had received any manner of tonsure were exempt from temporal punishment, *i.e.*, it may be presumed, at the hands of the King's Courts, for the Abbot would no doubt have maintained the prisons of the Bishops, and the punishments of the Canon Law, for he fortified his position, we are told in Keilway's Reports, by the citation of a Decretal.

Dr. Standish, in the Conference of Divines at Blackfriars, maintained that the Act impugned was "not against the liberty of the Church, as it was for the weal of the whole Realm." A passage of arms on the force of certain Decrees then appears to have taken place between Standish and a Doctor on the other side, and finally, "the Lords, who had heard both sides," thus

certifying to the important and formal character of the Blackfriars Conference, "desired certain Bishops to cause the Abbot to make open renunciation of what he had said at St. Paul's. But the Bishops refused, saying they were bound by the Law of the Church to maintain the Abbot's opinion; and so the matter rested until Michaelmas term."

In Michaelmas term, 7 Henry VIII., the next step in the proceedings was taken by the Convocation of Canterbury, which summoned Dr. Standish to appear and answer the following articles:—

"1. Whether it was lawful for a temporal judge to call clerks before him.

"2. Whether first [*i.e.*, minor] orders are sacred.

"3. Whether a constitution by the Pope and Clergy binds a country where the usage has been to the contrary.

"4. Whether a temporal prince can restrain bishops who refuse to punish etc."

The above text of the interrogatories administered to Dr. Standish is printed from the *Calendar of State Papers, For. & Dom., Hen. VIII.*, Vol. II., Pt. i. (1515—18), No. 1313, where it is inserted by the Editor, the late Prof. Brewer, from *Keilway's Reports*, 180. It seems right here to guard against the possible misapprehension of the value of Keilway as an authority for this case, to which a note by Prof. Brewer, *op. cit.* p. 351, might give rise. It would seem that Prof. Brewer was misled by the date of Keilway's Editor, Mr. Serjt. Croke, and supposed Keilway himself not to have lived sufficiently near the time of the case to be an authority. I am indebted to Mr. Luke Owen Pike, M.A., the present learned Editor of the Year Books, under the Master of the Rolls, for a very clear refutation of this error, in a recent letter in which he kindly put together for me the following *data*, which I gladly quote. "Robert Keilway was Reader at the Inner Temple in the year 1 Edw. VI. He was Serjeant-at-Law in 6 Edw. VI., Treasurer of the Inner Temple in 5 & 6 Phil. & Mary, and one of the *Gubernatores* of the Inner Temple in 1 Eliz., and again in 8 Eliz. How much longer he lived I do not know. But it is obvious that a lawyer who was Reader at the Inner Temple in 1 Edw. VI., could not then have been a child, and that he must have lived and studied law in the reign of Henry VIII." With regard to Prof. Brewer's language, in his editorial note, *op. cit.*, p. 351, where he says, "To what authority Keilway, who lived in the reign of Elizabeth, was indebted for this report, I have not been able to ascertain;" Mr. Pike appositely suggests that Prof. Brewer may have mistaken the date of Keilway's Editor, Croke, for Keilway's own *floruit*, in which case his doubts would be intelligible. As a matter of fact, however, Prof. Brewer was clearly in error as to Keilway's date, and the Reports come to us, as Mr. Pike forcibly says, with the double

authority of Keilway himself and of Croke, "who thought them specially worthy of publication." Whether, as Prof. Brewer held, Keilway's report of the case is "hardly reconcileable," with the next document (1314) printed by him in the *Calendar*, is another question, but it is not one which affects the authority of Keilway so much as the truthfulness of the account of the case given by Convocation in answer to "the charge of having called before them Prior Standish, D.D., for giving of counsel to the King's Grace, as well by words as by writing, in certain causes depending, in variance concerning the laws of God and of his Church" (*op. cit.* No. 1314, p. 353). The answer of Convocation (1) flatly denies the charge, and professes that Standish had long since laid himself open to the suspicion of heresy, thereby implying that they summoned him on such a charge.

(2) To the charge of having ministered to Standish in the Convocation certain articles contrary to the King's prerogative, they also oppose a flat denial, with the expression of hope that they shall not be punished "on any such sinister information," which seems to leave a doubt open whether the "information" was not, after all, true.

(3) They further declare, by a somewhat subtle mode of defence, that no articles were delivered to Standish in writing, although they were conceived in writing. This seems a practical confession of the truth of one charge.

(4) In the matter of certain articles said to have been ministered to Dr. Standish in Convocation, "specially that clerks should not be convented before lay judges," they aver that they never held any such communication with him, taking the contemptuous line that "if it was the thing that needeth any reformation, yet the said prelates well perceived that it could nother be holpen nor hurted by the said friar." They then hope that if they had "said in the Convocation House that the conventing or punition of clerks should not appertain to secular judges," they do not think that they would have fallen thereby "into any penalty of any law, statute, or act." And they proceed to bring a *tu quoque* against Parliament for speaking "divers and many things not only against men of the Church and against the laws of the Church, but also sometime against the King's laws, for the which neither the King, nor the prelates of the Church have punished them, nor yet desireth any punishment for their so speaking. Wherefore, the said prelates thinketh that it may be as lawful to them in the Convocation House to common and treat of things concerning both laymen and also the laws of the land (though so they do not) without falling into any penalty of any statute or act, or yet any other punishment in that behalf, as it is for them of the Parliament to common and treat of any causes sownyng against the Clergy and laws of the Church."

This reply, which is at once laboured and subtle, embodies a

distinct claim on the part of the Southern Convocation to act *ultra vires*, if it so chose, and it seems, therefore, to give a special importance to the case of Dr. Standish. The language of Convocation practically claims both swords for the Church. So Boniface VIII. claimed to be Cæsar as well as Pope.

E.

COUNT CAVOUR ON FREEDOM OF THE PRESS.

A SPECIAL interest naturally attaches to the opinions expressed on so important a subject by those who have guided the helm of the State in other countries than our own. I therefore take this opportunity of submitting the striking testimony to the value of Freedom of the Press, borne by one of the most illustrious Statesmen of recent times, the late Count Cavour.

Speaking in the Subalpine Parliament, in the Chambers of the then Kingdom of Sardinia, in 1852, at a time when modifications of the existing Press laws tending to restriction were being proposed, Count Cavour gave a brief but forcible summary of the effects of repressive Legislation as contrasted with Freedom, which I reproduce from his speech of 5th Feb., 1852, as printed in *Il Conte di Cavour in Parlamento*, edited by I. Artom and A. Blanc (Florence. Barbèra. 1868). Commencing with the position of affairs in Italy after the disaster of Novara, Cavour shewed that the failure of the attempt at freeing Italy in 1848 had exercised some influence on the continuance of a Republican party, which, in some instances, went to great lengths in the public expression of its doctrines through the Press. In Cavour's opinion, that party would have been much more formidable than he considered it to be at the date of his speech, if the Government had consented to use repressive measures. In France and in Belgium, he pointed out, the Press, after 1830, enjoyed ample liberty. In both countries the Press abused this liberty. It met with a different treatment in the two countries. In France, after the Fieschi attempt, measures restrictive of freedom, known as the September Laws, were passed. In Belgium nothing of the kind was done.

In France, the result was that instead of talking openly of Republics and Revolution, carefully veiled and ambiguous phrases were used, but the doctrines which the Government had sought to suppress were all the more surely spread abroad, and the

Republican party increased in volume in France, while in Belgium it dwindled, and finally vanished altogether.

On a minor detail connected with this question, that of imposing by law the obligation to sign articles in the Daily Press, it may not be uninteresting to record that Count Cavour cited with approval the example of our own country. Entirely opposed from conviction to compulsory signature, he contrasted the cases of France and England, saying that when the French Assembly desired to restrict the freedom of the Press, it found no more efficacious measure than compulsory signature. In England, he said, such a measure had never even been proposed, and the English Press enjoys an importance never reached by that of France.

F.

SOME ANALOGIES BETWEEN THE POLITICAL AND ADMINISTRATIVE INSTITUTIONS OF HUNGARY AND ENGLAND.

ANALOGIES between Teutonic and non-Teutonic institutions have already been presented to the reader in these Appendices, on the ground that they may not improbably be found to suggest relations either hitherto unsuspected, or not sufficiently considered, between Aryan and non-Aryan institutions.

There exist certain at least superficial resemblances between the administrative system of the kingdom of Hungary and our own County institutions, to which attention was drawn in the *Journal* of the British Archæological Association for Sept., 1872, in an interesting paper by Mr. Augustus Goldsmid, F.S.A. In this paper it was pointed out that the Parliamentary system of Hungary is, and has been from early times, Bi-cameral, consisting of a House of Magnates and a House of Deputies. It was also noted that the County, or *Comitat*, forms an important feature in the Hungarian administrative system, the whole kingdom being divided into fifty-two counties, each administered by a *Comes supremus*, answering to our Lord-Lieutenant, and whose appointment is likewise now vested in the Crown, but was formerly elective, and vested in the freemen of the county. Some of these *Comites supremi* are still hereditary, as Lords-Lieutenant, in some cases, formerly were in England.

There is a *Vice-comes*, or sheriff, in whom the executive portion of the judicial office is centred. The appointment is elective, and

vested in the freemen of the county in Quarter Session (*Congregatio*) assembled. The *Congregationes*, translated Quarter Sessions by Mr. Goldsmid, are held quarterly, and are presided over by the *Comes supremus*, attended by the *Vice-comes* and his deputy. They are attended by all freemen possessing land, the clergy of all Rites, and those entitled in old Hungarian law to the appellation *honoratiores*, or persons following what may broadly be called the learned professions. The *Congregationes*, so constituted, discuss all non-religious County affairs, including the estates of orphans, who are considered in Hungary to be the wards of the County.

It is a somewhat curious historic coincidence that the 'Golden Bull' of Andrew III., called by Mr. Goldsmid, as by Dean Milman, the 'Magna Charta of Hungary,' is practically contemporary with Magna Charta, being only a few years later in date.

G.

THE MONARCHICAL PRINCIPLE IN THE CONSTITUTION OF THE U.S.A.

SIR HENRY MAINE has pointed out, in his interesting volume on *Popular Government* (Lond. 1885), that although references to the British Constitution in the writings of the framers of the Federal Constitution of the United States are infrequent, its principles must nevertheless have been present and even familiar to persons who had themselves been born and had lived the greater part of their lives as British subjects.

There is therefore nothing surprising in the fact that a distinguished American Jurist, the late Hon. William Beach Lawrence, should have devoted an article in the *North American Review* (New York. D. Appleton & Co.) for Nov., 1880, to the consideration of the 'Monarchical Principle' in the Constitution of the United States. As this article, which the present writer received from its distinguished author, may well be unknown to most of the readers of this *History*, some extracts from it will probably not be unacceptable.

Very early in his statement of the subject under discussion, Mr. Beach Lawrence quotes Webster as saying that "the Revolution of 1776 did not subvert Government in all its forms. It did not subvert the local laws and local legislation." How this local legislation was enacted Mr. Lawrence shews by recalling the fact

that before the Revolution, and "while the states were still English colonies, there existed in each Province a Legislature composed of two Chambers. The House of Representatives was in all cases elected by the inhabitants, though in the greater part of the colonies the Upper House, as well as the Governor, who exercised, with or without a Council, the executive power, were named by the Crown, or by proprietors residing in England, to whom, in some of the provinces, had been accorded almost sovereign rights. At the epoch of the Revolution these Governments were replaced by Constitutions adopted by the people, and based on their ancient usages. Governors and Councils and elective Senates were substituted for the officers named by the King or by the proprietors."

How abiding was the influence of the Constitutional relation of the several States with the mother country is strikingly proved by the circumstance that Connecticut "preserved her government as established by the charter of Charles II. till 1818, and Rhode Island hers till 1842." And it is worthy of note that in those two States the Popular element was the most strongly developed in the administration, for in both "the inhabitants had always selected the Governors as well as the two branches of the Legislature."

As regards the question of State sovereignty *versus* Federal Sovereignty, Mr. Beach Lawrence quotes the opinion pronounced by the Supreme Court of the United States in 1796, to the effect that "the powers of Congress, such as were exercised by them from their first meeting till the ratification of the Confederation in 1781, were in themselves revolutionary powers. The separate States retained all the rights of internal sovereignty, while Congress possessed all the rights of external sovereignty." The relation between the several States and the Federal Power in Congress is thus defined by the Articles of Confederation, as adopted in 1781, after the adhesion of Maryland, and which became thenceforward, as Mr. Lawrence says, universally obligatory; each State retains "its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."

"Congress," Mr. Lawrence goes on to shew, "had not merely ordinary executive and legislative powers, but had authority to create courts of prize, and to constitute tribunals to settle conflicting claims as to boundaries of States, and as to titles derived from different States. As regards foreign relations, the Articles [of 1781] accorded to the United States in Congress assembled the greater part of the powers granted to the Federal Government by the present Constitution, including the right and power of deciding alone and exclusively on the subject of peace and war, except in the case of invasion, the sending and receiving of ambassadors, and of entering into treaties and alliances."

The Monarchical principle, as represented in the American President, to an extent, it may be remarked, which seemed extraordinary to Larochefoucauld, in 1789, when the President was, *ex hypothesi*, re-eligible for life, had perhaps a narrow escape of being monarchical in name and in the character of transmissibility, for Mr. Lawrence states that Jefferson, "on his arrival from France to assume the duties of Secretary of State under Washington, found the sentiments of the more wealthy or aristocratic classes to be in favour of an hereditary monarchy." In this connection it may not be uninteresting to mention that a similar sentiment has lately found expression in the United States, though whether it is ever likely to be adopted as the expression of the views of a party in the United States, cannot yet, as far as I am aware, with any safety be forecasted. Still, there is something sufficiently remarkable to European notions, in the fact of the suggested possibility of an American monarchy made in a pamphlet entitled *The Kingdom*, by Frederic Gregory Forsyth (Charlottesville Chronicle Press. 1884), to call for mention in these pages. "With an hereditary President," says Mr. Forsyth, "the constitution of the United States is the best yet." The American Republic itself Mr. Forsyth regards as having been formed from the "best elements" that Royalty had previously preserved, and which had taken part in the struggle for "a constitutional representation of the colonies in the British Government until the rupture between the two portions of the empire was so great as not to be closed."

On the powers of the President, Mr. Forsyth seems to take a view very similar to that of Mr. Beach Lawrence. "The powers of the President of the United States," says Mr. Forsyth, "are greater than those of the Queen of Great Britain, and by far than were those of Queen Ann [of Austria]'s Government in France."

The magnitude of the office of the President was emphasised by John Quincy Adams, when he said, citing and commenting upon the language of the Federal Constitution, "THE executive power shall be vested in a President of the United States of America," that "the establishment of justice in the intercourse between the nation and foreign powers was thus pre-eminently committed to the custody of one man; but that man was George Washington." The exactness of Mr. Adams's conception of the creation of the office for the man is borne witness to, says Mr. Lawrence, by the concurrent testimony of his contemporaries, with many of whom, it is interesting to remark, Mr. Beach Lawrence states that he himself was "in early life brought into frequent contact."

It may perhaps be questioned whether this "creation of the office for the man" was either a scientific, or, broadly speaking, a safe process of Constitution building, though it reflects the highest possible honour on the memory of George Washington.

Some of my American critics have seemed to me to misunder-

stand the scope of this Appendix. I have not, as far as I can see, misunderstood the Constitution of their country: I have simply brought out a feature upon which a distinguished American Jurist thought it worth while to dwell at some length, and which some Americans appear to regard as worthy of further development. That the framers of the American Constitution made no pretence of evolving out of their inner consciousness a brand-new Constitution, but that, on the contrary, they were, in a broad sense, admirers, and even imitators, of the British Constitution, does not, it is submitted, admit of a doubt. What would seem to have been the case is that they, perhaps not unnaturally, rather exaggerated the influence then pertaining to the Monarchical principle, which they imagined to be more powerful than it really was.

The American statesmen failed to see that 'the Monarchical feature was,' as Mr. Arthur Hassall puts it, *Eng. Hist. Rev.*, July, 1890, 'rapidly passing away.' At the same time, the apparent, and actual, personal influence of George III. was so great that the framers of the American Constitution may well be excused for having supposed it greater even than it was, and also more permanent. They made their President, during the tenure of his office, in some respects more powerful than the King whose allegiance they had thrown off. They probably thought that to create a person with more than Kingly power, but without the obnoxious name, was a stroke of high policy, and this their creation may have been and may yet be a powerful factor in American Politics. If that had been all which the framers of the American Constitution had accomplished, it might well be doubted whether it was worth while to have spent so much in men and in money to establish so close an imitation of a declining Old World power. But, in fact, they did much more than this: they, far more truly than Canning, called into existence a New World to redress the balance of the Old, and, so doing, they laid the foundations of a great Political building, for the construction of which they deserve to be held in high honour.

H.

CHURCH AND STATE IN ENGLAND IN THE TWELFTH CENTURY.

The relations of Church and State in this country during the Twelfth Century were more than usually complicated, alike by differences between the members of the English Episcopate themselves, and by the fluctuations in the attitude of the Popes towards the Archbishops of Canterbury, depending upon their own varying fortunes in the great parallel conflict between the Papacy and the Empire. It is obvious that Becket was greatly hampered alike by the non-adherence to his views of some of his principal suffragans, and by Papal tergiversation. That he despised both Pope and suffragans when they did not support him is clear, and probably enough the Pope came in for the largest share of his contempt. What Becket fought for seemed of doubtful value to a fairly large number of his Episcopal brethren. The Church, therefore, had the disadvantage of being as a house divided against itself. This, of course, is not a feature special to England, but is common to the struggle between Church and State as it raged on the Continent as well as in England during the war of the Investitures. The violence of English Kings and of Roman Emperors alike did the greatest harm to their side in the controversy. Becket slain became St. Thomas of Canterbury, and a far more powerful weapon in the hands of the Papacy than Becket living, usually a source of difficulty alike to Pope and to King. The question what Becket really gained for the Church is one to which various answers have been given. It appears to the present Editor that the only real gains to the Church were those which St. Anselm obtained for it, although even in his day the English Episcopate were not unanimously on the side of the Primate. Becket appears in fact to have gained no point for the Church, except perhaps his infinitely greater utility to Alexander III. as a 'Martyr' than as a living, querulous Primate, difficult to support without provoking a King's enmity.

Anselm, on the other hand, really obtained all that he fought for, since after his time no man could think that the ring and staff of the Bishop were held, like the sword, from the King's hand. The compromise effected clearly distinguished between the temporal and the spiritual aspects of the Bishop, as at once a great officer of the Church and of the State.

Becket's opposition to the Constitutions of Clarendon was perhaps unavoidable, yet the Constitutions, in themselves, appear to have been in the main a statesmanlike attempt at a solution of the always difficult problem of the relations of Church and State.

And if the Primate would have received them, his suffragans generally would have raised no objections, though it is perhaps scarcely probable that the Papal approval would have been given, for the obvious tenor of the Constitutions was to have questions arising within the English Church settled in England, by agreement between the King and the Primate, without calling upon a foreign Prelate to intervene, and this was a solution which would have commended itself to the English national feeling, among the clergy no less than among the laity, though at least proximate to Heresy in the eyes of the Papacy.

I.

THE CONSTITUTIONS OF CLARENDON AND THE COURT OF THE ARCHBISHOP OF CANTERBURY.

THE Constitutions of Clarendon, against which Pope and Primate alike fulminated, seem to the present Editor to have a practical interest, if not actually a practical bearing, in matters of controversy at this day, and it therefore appears worth while to offer a few words on the subject.

The Court of the Archbishop of Canterbury is, it is believed, acknowledged on all sides to be a Mediæval Court, and therefore Mediæval precedents may be of use to illustrate the possible course of events in a case which has, in point of fact, revived alike the Court itself and public interest in the Court, whose very existence had been almost, if not quite, forgotten.

One leading feature of the Constitutions of Clarendon, as regards Ecclesiastical matters, clearly was that all Ecclesiastical controversies should, somehow, be finally decided within the Realm, leaving no opening for appeals to the Court of Rome, which never was popular either with King, Bishops, or People, at any time during the Middle Ages. To represent the Mediæval English Church as subservient to the Pope, would, it appears to the present Editor, be utterly false to facts. The simple truth is what the Author of this *History* has frequently stated in his text, that the relation between the Church of England and the Roman See was one of respectful deference, but nothing more, and on ancient Ecclesiastical principles, it is submitted, nothing more was due. It cannot be doubted that the exactions of the Chambers called Apostolic, as the phrase ran in the days of Henry VIII., and the extravagant claims to taxation of Benefices and provision

of aliens with rich preferment in England, greatly aided in keeping up a feeling of resentment in this country throughout the Middle Ages. When, therefore, it was proposed, by the Constitutions of Clarendon, that all controversies in matters Ecclesiastical should be finally determined within the Realm, although a Becket might rage and an Alexander III. might fulminate, the general feeling of Englishmen, Clerical as well as Lay, was likely to be on the side of the Constitutions.

There was to be an appeal from the Archbishop, but it was to be to the King instead of the Pope. This was perfectly in keeping, of course, with the view, very sound in itself, that the King was bound to see justice done between subject and subject, and that if any were aggrieved by what appeared to him a denial of justice, he might appeal to the King, who, as *Pater Patriæ*, presumably, would be bound to give such remedy as he could. The King might, when a cause came up to him from the Archbishop, remit it to the Archbishop, with directions, no doubt, to revise his original judgment in certain points wherein the King's Court might have adjudged it defective or erroneous. It is possible that this brief outline of the scheme devised in the Constitutions of Clarendon may throw some light on questions of great practical interest which are undoubtedly difficult of solution. It would seem that, applying known Mediæval principles to a confessedly Mediæval Court, the jurisdiction of the Crown cannot be ousted, in whatever shape it may be held to exist, whether the Judicial Committee of the Privy Council, or any other Court, but that the Royal Court may remit the case so coming to it (and in what way it should come, the present writer does not pretend clearly to see) to the Court of the Archbishop, on any point on which the Archbishop's judgment may seem to it not to do justice as between the lieges of the Crown, parties to the case.

J.

THE VETO POWER AND CONSTITUTIONAL LIMITATIONS IN THE COLONIES.

ATTENTION has recently been drawn in one of our American Colonies to the delegation of the Royal Veto, which is generally assumed to be practically obsolete in the mother country, to the Governor-General of the Dominion of Canada, and some remedy is sought by our Colonial fellow subjects for the disadvan-

tage at which they think the continuance of this power places them. There is apparently a difficulty *in limine*, arising from the fact that, as in the case with other 'blunderbuses of the Law,' the Veto has never been relinquished by the Crown, and is therefore still, in theory, part of the armoury from which weapons, however rusty and unsuited to the times, may yet be drawn, and as far as the United Kingdom is concerned, it is not proposed here to discuss the question. But with regard to the Colonies, it may be worth while raising the point, as it has been raised in the *Western Law Times*, Vol. I., No. 2, for May, 1890 (Winnipeg, Manitoba), in relation to a recent exercise of the power affecting the Province of Manitoba.

The position complained of under the Veto, as it at present exists in Canada, is thus defined by the Manitoba periodical just cited. Applying the doctrine of the Judicial Committee of the Privy Council, in *Powell* v. *Apollo Candle Co., Limited*, 3 Cartwright's Cases, to the Provinces of the Dominion, where a Second Chamber has been abolished, 'we find,' says the *Western Law Times*, *loc. cit.*, 'a Government practically without limitations. The Governor-General's Veto does not act as a revising-chamber, and if there is a necessity for the one, the necessity for the other is urgent. The Lieutenant-Governor must follow the advice of his Ministers, and has no Veto. It is true, he is given the power of disallowance in precisely the same terms as the Governor-General (B. N. A. Act, §§ 55—90), yet he has lost it in twenty years. Save where Dominion interests are affected, the Governor-General is not supposed to interfere. Hence we find one chamber with unbridled power, practically without a limitation—a state of things not contemplated by the constitution—and unparalleled by any State in the union.' By 'union,' in this reference, is meant, no doubt, the United States. The account given of the decay of the Veto power in Canada tallies pretty closely with its history in this country. 'The history of the Veto in England,' says the Manitoba writer, 'has been unique. From the earliest times, when it existed in full vigour, until it was last exercised, the process has been one of gradual decay.' But however inactive it may have become in Home affairs, the Veto 'has often been exercised in the disallowance of Colonial enactments, where Imperial interests are affected. The people of Canada, as long as they remain subjects of the British Crown, will peacefully submit to such interference, and admit the justness of it.' It is possible, however, that in some given case the people of Canada might not 'admit the justness' of the Veto power, and then it is hardly too much to suppose that they might decline to 'submit peacefully' to such interference. This is a possibility which should be borne in mind. There are some grave objections to the exercise of this power, which are thus marshalled by the *Western Law Times*, *u.s.*, viz., 'the hostility engendered in many cases;

the lack of definite principles defining its exercise; the semi-judicial functions, without an appeal, that it assumes, when it interferes with Provincial Legislation; the increased lack of respect for it on account of the frequent exercise, the sentiment in the Provinces that it is being used as a means to limit their exclusive rights; and especially the feeling that it is brought into play by a semi-irresponsible power; for responsibility to the people is the keystone of the British Constitution.'

It is not unworthy of notice that according to the writer in the *Western Law Times*, the present state of things within the limits of the Dominion of Canada involves two points of antagonism to what are supposed to be traditional elements of the Constitution in the mother country. It involves the existence of 'one chamber with unbridled power, practically without a limitation,' which the writer justly calls 'a state of things not contemplated by the constitution,'—and it also involves the possibility, on which he with equal justice insists as requiring provision to be made against it, that a 'revolution' in the 'government might be proposed and executed without an appeal to the people.' On these *gravamina* it may perhaps be noted that it ought to be contrary to the general feeling of this country to favour Single chamber Constitutions in Colonies possessing Representative Institutions, if we intend to propound those Institutions as essentially modelled upon our own. With regard to the possibility of a revolution in the government being proposed and executed without an appeal to the people, it is apprehended that the Bi-Cameral system will not necessarily save any country from that evil. The nominally existing system of Government has before now been revolutionised by Parliament, or rather by one portion of the Parliament of this country, assuming to act for the whole, and to declare the other Chamber of no use, and the Monarchy abolished. And the same process might, *ex hypothesi*, be repeated one day by one of the Houses of the Parliament of the United Kingdom, or by both, if they happened to agree, whether in the direction of Absolutism or of so-called Republicanism. It does not therefore seem to be at all certain that the possession of a Second Chamber would necessarily save any Province of the Dominion of Canada from the possibility of a revolution in its government without any appeal having been made to the people. But it would be less likely to happen under the Bi-Cameral system, and if there be any value attached in our eyes to that system we ought, it would seem, to favour its extension among our Colonies. It further appears that some amendment of the British North America Act, 1867, is desired, or at least is thought desirable, by those in Manitoba and elsewhere who may share the views of the *Western Law Times*, for the purpose of effecting some Constitutional limitation of the Veto power. This seems only reasonable when the disuse of that power, amounting to its practical extinction in this country, is

taken into consideration. The suggestion of the *Western Law Times* that the Courts should be empowered to pass upon cases involving questions of Constitutional *ultra vires* seems also reasonable, in view of the fact that the Supreme Court of the United States expressly decides upon the Constitutionality of Acts of the several States of the Union. The question whether the Veto power, where it exists, has or has not been lawfully exercised, seems to be naturally one for the Courts, if the Courts are really independent, and if they are not, it were better to put an end, in any Colony, alike to the Courts and to Representative Government so-called.

K.

THE *REFERENDUM* AS A CONSTITUTIONAL LIMITATION.

THE question of the desirableness, or the reverse, of introducing into the United Kingdom that precaution against sudden revolutionising of the Constitution, or even against any Legislation involving Constitutional alterations without a previous appeal to the people, known in Switzerland as the *Referendum*, is being so much discussed as a question of modern 'practical Politics,' that it seems desirable to offer a few remarks upon it here.

That safeguards and limitations of some sort are greatly needed, may be taken to be granted on all sides. The *Referendum* is alluded to in the discussion on the necessity of providing such limitations in Canada in the Article in the *Western Law Times* (Winnipeg, Man.), cited in the Appendix on the Veto Power. The Manitoba writer does not wish for its introduction into Canada, but the fact of his mentioning it by name shews how widespread is the consideration of the possible value of this or some similar safeguard.

That the *Referendum* is found, in practice, to be a real and fairly effectual check in the Constitution of the Helvetic Confederation, may perhaps be accepted as a fact. The question whether its introduction, bodily, into the written or unwritten Constitution of a country or Colony not hitherto possessing such a safeguard is a question far from easy of solution, and depending to a considerable extent on the machinery available for carrying it into execution, and also on the Political habits of the people among whom it is sought to introduce the *Referendum*. That

some mode of direct appeal to the people, from which the element of mere Party Politics is eliminated, would be desirable in any country, can scarcely admit of doubt. What may be doubtful, and as regards alike the United Kingdom and its Colonies probably more than doubtful, is the possibility of so reaching the people. In the United Kingdom, at least, and probably also to a great extent in the Colonies, what seems in the highest degree unlikely, indeed next door to impossible, is the devising of some means by which the people could be so reached. Registration, in this country, is so entirely in the hands of Party Associations, and the challenging or establishing of a particular person's right to vote is so inextricably mixed up with Party Politics,—most unfortunately, as it appears to the present writer,—that it seems hopeless to expect any good from the introduction of such a safeguard as the *Referendum*. That the establishing of the right to be registered as a Parliamentary voter should be, as it has been allowed to become in the United Kingdom, a matter for Party Associations to wrangle over, cannot be conducive either to Political morality or to the unbiassed exercise of a Popular power of Constitutional limitation. The question whether the particular form of safeguard called the *Referendum* would be in itself suitable to our unwritten Constitution, full as it is of anomalies and compromises, is one which, it seems to the present Editor, can scarcely be considered other than Academic, until it has been clearly proved that some means can be found, beyond the reach of the manipulation of Party Registration Associations and Caucuses, for getting at the real *Vox Populi*, in the exercise of its legitimate function of preserving the integrity of the Constitution.

We have been instructed in the nature and objects of the *Referendum* so recently and by such high authorities, viz., Mr. A. V. Dicey, in the *Contemporary Review* for April, 1890, and Prof. Freeman in the *Universal Review* for July, 1890, that it seems unnecessary in this place to do more than give the merest outline of what the *Referendum* purports to be.

This 'awkward Latin name,' as Prof. Freeman calls it (*op. cit.*, p. 343), means, that 'when a measure has passed both Houses of the Assembly, it shall be *referred* to a vote of the people, Yea or Nay. It must of course be a simple vote of Yea or Nay; discussions and amendments are out of the question. And the *Referendum* may be either *Obligatory* or *Facultative*. That is, it may either take place as a matter of course in the case of all measures, or of some particular classes of measures, or it may take place only when it is demanded by a certain number of citizens.' Of this safeguard of the Helvetic Constitution one point, brought out by Prof. Freeman, is noticeable. It is, as he says (*op. cit.*, p. 341), 'one of the latest inventions of modern political ingenuity.' But though so modern it yet has its roots in Antiquity, for it is evidently an outgrowth of the *Landesgemeinde*,

'an institution of the hoariest antiquity.' This historical connection probably it is which saves the *Referendum* from more than a slight bullying for its 'awkward Latin name,' and helps to give it a place of honour, though we may not say that Prof. Freeman exactly accepts the *Referendum*. On the other hand, we must not say that he is against it. He prefers to state the case, so that there may be no excuse for readers of the *Universal Review* if they fail to grasp what is meant by this new shibboleth of some who would fain be considered 'practical' Politicians. But Prof. Freeman plainly declines to commit himself one way or the other.

The point that the *Referendum* is of kin to an institution of hoar antiquity seems to be worth considering, for what it involves is that the modern political invention is but a present-day application of a portion of the ancient Constitutional machinery of the country. It is therefore of native growth. If introduced here it must needs be an exotic. But the question whether such a Political exotic, transplanted bodily from another and in many respects different Constitution, would be likely to flourish in British soil and perform the same valuable services as it may be held to perform in its native soil, is one to which it may not be safe to give an unhesitatingly affirmative answer. There is also the question whether the Swiss people, among whom the *Referendum* possibly answers its purpose, are not really more highly educated in the exercise of their Political powers than the people of the United Kingdom. It may be greatly doubted whether the people of this country would know what to do with the *Referendum*, if they got it.

Notwithstanding the general suggestion of the desirableness of its introduction alike by the writer of the Article on the *Referendum* in the *Edinburgh Review* for Jan., 1890, and by Mr. Dicey in the Article discussed by Prof. Freeman and by Prof. Bryce in the *Speaker* for 19th April, 1890, there remains a doubt whether such an exercise, nominally, of the power of the People, would be, in this country, anything more than an exercise of the wire-pulling ingenuity of the various Party associations for the manipulation of voters under the specious names of 'Registration Associations,' 'Eight Hundreds,' or any other number, Caucuses in fact if not in name. And if so, it may seem that our last state would be worse than our present state, for we should be supposed to have spoken our minds, man by man,—perhaps, also, woman by woman,—when in point of fact we should have done nothing of the kind. It is suggested that the *Referendum* might only be used on rare and great occasions, and Mr. Dicey has singled out Home Rule and Disestablishment. Prof. Freeman doubts as to one of these, and thinks that perhaps that is too purely Irish to demand more than an Irish *Referendum*, not one applied to the whole United Kingdom. However this may be, the suggestion

that the class of cases in which alone the *Referendum*, if introduced here, would be called into play would be only cases of the first magnitude, is enough to warrant all the earnestness with which Prof. Freeman endeavours to set the question before us so that we may think it well over and understand it fairly before going any further. And this is, undoubtedly, eminently desirable. Prof. Bryce thinks that the introduction of the *Referendum* would 'transfer the power of dissent, still nominally vested in the Crown, the wearer of which no longer ventures to use it, to the electorate, which would use it freely enough.'

That is possibly, perhaps probably, true enough, but is it so certainly a change embodying the advantages which Prof. Freeman seems to unite with Prof. Bryce in thinking that it would embody? If our experience of the British voter led us to the conclusion that he was so highly educated in the Science of Politics as to be likely to give his real personal opinion for or against a particular measure submitted to him, without the influence of Party politics and the persuasions of Party wire-pullers being brought to bear upon him, there might be more to be said in favour of the experiment of introducing the *Referendum* into the Political machinery of the United Kingdom. But if, as seems but too probable, the introduction of this so-called safeguard were to be simply the addition of yet another string to the bow of the Party wire-puller, then our last state would, it is submitted, be worse than the first, and we should be as far as ever from having really called forth the *Vox Populi*.

The latest news from the Helvetic Confederation in the shape of the intervention not merely of a Federal Commissioner, which was no doubt a necessary or at least a desirable measure, but also of large bodies of Federal troops of various arms, can scarcely be encouraging to those who suggest the introduction of the *Referendum* into this country. The question which will be placed before the People in the Canton of Ticino in October, 1890, is whether the Existing Constitution shall be revised, or not. This is a very proper question to submit to the People, in whatever way the Existing Constitution may direct it to be submitted. But the despatch of really considerable Federal military forces into one of the Cantons of the Confederation, before the taking of the vote, appears to be a measure not distinguishable from coercion, and that under its severest aspect. The People of Ticino have shewn themselves dissatisfied with the Administration of their Canton, and have risen against it, with a seemingly preponderant Cantonal feeling in favour of the Rising. Any Government can send troops to overawe electors. The Federal form of Republic is not needed for that. But such a course of action savours more of Absolutism than of Constitutionalism, and the fact of its being taken by the Helvetic Federal Council tends to prove that the *Referendum* is not a panacea.

L.

EXTENSION OF THE SUFFRAGE.

THE view taken in the text of this History as to the nature and tendency of recent extensions of the suffrage seems to the present Editor, as has been to a certain extent intimated in his Notes, somewhat too optimistic, and some considerations which may modify this optimism will perhaps not be out of place.

The extensions which have taken place since the last edition of this History which the author was able to see through the press, viz., the Second Edition, in 1883, have been considerable and far-reaching, but they are certainly not final, and such approach to finality as is foreshadowed by what are called 'advanced' writers is one which portends much greater changes than we have yet seen. But none of these Constitutional changes, or modifications, if that epithet be preferred, indicates any recognition of Intellect or Education as a Factor in the movement, while the retention of any property or rating qualification in the future is plainly suggested as being quite out of date. The modern elector is increasingly illiterate, or next door to illiterate, and therefore all the more likely to be the tool of Party agencies. We have long been told that what we are, and must be, tending to is the goal of 'one man, one vote'; and now we have it suggested that, in order to be logical, we must go a step further, 'one woman, one vote.' At the same time, the idea of rating as any test for the Electorate is held up to us as a rapidly decaying superstition. These things will perhaps not come to pass yet awhile. Lady Dilke, in a very interesting, and, from her point of view, temperate article in the *Universal Review* for July, 1889, admits this, and appears not to wish to hurry events. In this, her wisdom is much to be commended, and likewise in her earnest plea for the education of women before proceeding to agitate for their share in the suffrage as a sex. Education is no less desirable for the male elector, and is scarcely less needed. Whether a particular extension of the suffrage can properly be advocated on the score of its being 'logical,' may perhaps admit of question, and whether the people of the United Kingdom are a logical people may be open to doubt. Our neighbours across the Channel are in the habit of saying that we are not logical, else we should long ago have had a Republic. It might be possible to reply that we have, under the 'monarchal form,' practically reached a 'parliamentary democracy.' Whether we have thus reached our final resting-place is another question.

To Lady Dilke, at least, it seems clear that we have not by any means reached finality. 'Neither the ultimate resting-place,

nor even, if regard be had to either logic or justice, the temporary halting-place, can be found in a nominal rate-paying franchise. On the principal [*sic*, but we credit this obvious blunder to the printer of the *Universal Review* and not to the author of the article.—ED.] of this nominal rate-paying franchise great inroads have been made by the lodger franchise, and again by the service franchise, and the Parliamentary franchise has been differentiated by these from the various local franchises. The assimilation of the Parliamentary and local franchises has, therefore, obviously become impossible, except by going considerably further in the direction of extension. The exclusion, in the name of the principle of property, of some of the richest people in the country, whilst, under the present interpretation of Mr. Goschen's Act of 1869, the poorest tenement occupiers are included, has made the supposed property basis of the franchise ridiculous, and there is a general admission that a base for the franchise wholly apart from the possession of property will have to be discovered.' What this base, 'wholly apart from the possession of property,' should be would seem to be the problem which awaits solution, but it is rather suggested than stated by Lady Dilke. It would seem, however, to be contained in the concluding words of the Article, that 'greater reform which shall give the vote to every grown-up person without distinction of sex.' Nothing short of this, it may be presumed, would be acknowledged as our 'ultimate resting-place' in the extension of the Suffrage. One statement made quite incidentally by Lady Dilke seems to deserve notice here, as an instructive commentary on the piecemeal legislation of the day. 'It is true,' she says, 'that the power and value of the electoral vote in itself is now so diminished by the growing force and organisation of public opinion that the addition of even a large body of new electors would probably make very little difference to the current of popular verdicts.' That the 'power and value of the electoral vote' should have diminished to the extent suggested is, if true, as we believe it to be, a fact of great significance, but we doubt whether the true cause is that put forward by Lady Dilke. We are more inclined to believe that the vote has been given to classes which set little or no value upon the franchise.

M.

THE COURT-LEET.

THE present time seems to be one of unrest, if not of revolution, on most points of Historical Enquiry into Institutions, and of this fact the Court-Leet seems to be one of the latest proofs. The old view, involving the great antiquity of this jurisdiction, has been brushed aside, so to speak, by Mr. F. W. Maitland, in his edition of *Select Pleas in Manorial and other Seignorial Courts* (Selden Society, 1888), in favour of a view, not yet established, that this Court had its origin in 'seignorial usurpation favoured by accidental confusion.' Mr. J. H. Round, in a notice of Mr. Maitland's book, *Eng. Hist. Rev.*, July, 1890, seems to welcome the new hypothesis at least to the extent of saying that 'the theory of antiquity is as difficult to establish as the theory of confusion.' Mr. Maitland holds, or rather perhaps suggests, that the Jury of Presentment originated in the Assize of Clarendon, and becoming 'implicated' with the pre-existent View of Frankpledge in the great half-yearly Hundred Court, 'assumed the form we meet with in the sheriff's towon' [*sic*, *Eng. Hist. Rev.*, *loc. cit.*, an apparent printer's error twice repeated in the same line of Mr. Round's notice, but which we scarcely suppose to be the brand new language of a new school of Historians.—ED.]. The next step suggested is that the Sheriff's tourn (to use the old form of the word) was 'imitated' by those lords who enjoyed Views of Frankpledge, and who 'endeavoured to develop their capital pledges' into the Jury of Presentment that we are 'familiar with in the Court-Leet.' Mr. Maitland, it may be added, only puts this view forward 'tentatively,' and it is a view so full of hypotheses that it could scarcely, it seems to us, be put forward in any other manner. It may be questioned whether the hypothetical view suggested by Mr. Maitland is more in harmony with the probable evolution of the Court-Leet than Mr. Digby's view, *Hist. Law of Real Property*, 1884, p. 15, where he says, in his account of Manorial jurisdictions, 'In the later grants [speaking of T. R. E.—ED.] it is very common to find words [commonly, 'sac' and 'soc,' importing 'jurisdiction,' 'the franchise of holding a court'; so Digby, in *n.* 7, *loc. cit.*—ED.] expressing that rights of jurisdiction are conveyed together with the land. The rights were regarded as taken away from the hundred court and vested in the grantee as the owner of a franchise or liberty or district exempt from the jurisdiction of the hundred. . . . Thus the great man of the district acquired the headship or presidency of the courts held within the district, and by a gradual change the village assembly or mark-moot passes into the court

of the tenants of the lord, called in later times the court baron or customary court; while the court leet of later times probably represents the jurisdiction of which the hundred was deprived by express grant.' Further on, Mr. Digby says, *op. cit.*, p. 52, distinguishing between the Court Baron and the Court-Leet, 'the court baron exercised civil jurisdiction especially in matters relating to the freehold lands within the manor. Criminal jurisdiction was amongst the functions of the court leet, and depended on a real or supposed grant from the crown.' Again, p. 53, 'The leet is the assembly of the whole community, and seems to date from a time when the community was small, and could gather under a tree, on the side of a hill, or upon a village green, and transact business affecting the interests of all its members.' There seems to the present Editor to be more simplicity, and more probability also, in this conception of the Court-Leet than in that which is suggested by Mr. Maitland and Mr. Round.

N.

THE PILGRIMAGE OF GRACE.

SOME interesting matter connected with the great Northern rising, known as the Pilgrimage of Grace, has lately been printed in the *English Historical Review*, July, 1890, pp. 550 *seqq.*, in the shape of the Interrogatories administered to Roger Aske, Lord Hussey, Lord Darcy, and Sir Robert Constable, and their answers. It would be impossible to do more than refer very briefly to this mass of documentary evidence, but some of the questions and answers deserve to be specially noted.

It is evident that the insurgents generally believed, or at least professed to believe, that the Church goods were to be taken away, and that there should be left to stand but one parish church within seven miles. This would seem to be simply an exaggeration of some of the phases of the Reformation in England. Roger Aske, in his answer to the seventh interrogatory, admits that he 'thinkes those brut[es] were one of the greatest causes' of the Insurrection, but he also thinks that the greatest cause was the 'supp[re]ssion of abbeys,' which, he says, 'the brut[es] of the co[m]ens moste grudged at.' It may be as well, perhaps, to remark that 'brutes' here = bruits, or reports. Again, in answer to the nineteenth Interrogatory, Aske says that what the Insurgents chiefly 'grudged' was, as before stated, the suppression of the

Abbeys, and also the Act of Supremacy, which, they thought, 'shulde be a diuision from the churche.' They also 'grudged' the assignment of the Crown by the last will of Henry VIII., the illegitimacy of 'my Lady Marie,' the Statute of Uses, and of First Fruits, which they said would be 'a decaye to all religion'; and they 'grudged at thacte that word[es] shulde be treason.' This last 'grudge' is far from unreasonable. With regard to the Supremacy, there is a distinction, noted in the present Editor's notes, which seems to have been taken by Aske himself. He states that it was he himself who 'putt in touching *cura*[*m*] *a*[*n*]*i*[*m*]*ar*[*um*], which shulde belonge to the busshop of Rome.' The rest of his companions, he says, would have annulled the 'hole statute.' The first idea, according to Aske, was to get these statutes annulled by petition: failing that, as it was pretty obvious would be the case, they would proceed, necessarily, to 'geate theym reformed by swerde and battaill.' The result, as we know, was a taking of vengeance both swift and terrible when the King's banner was set up in the North, and the Laws Martial took the place of the Common Law.

O.

THE IMPEACHMENT OF BUCKINGHAM.

A RECENT interesting volume, *Documents illustrating the Impeachment of the Duke of Buckingham*, 1626. Edited by S. R. Gardiner, LL.D. Camden Society, 1889, throws some light on an important feature in the Constitutional aspects of the reign of Charles I. The general result of the careful researches of the Director of the Camden Society is that not much documentary evidence of any value has been found, and what there is centres round five points in the Impeachment, which it may be well here to summarise.

I. The purchase of the Wardenship of the Cinque Ports. The Papers now printed, in Mr. Gardiner's belief, 'appear to show a probability that Buckingham, in making the purchase, had a public object in view.'

II. The Guard of the Seas. On this point there is 'even less that is new to be shown.'

III. The Seizure of the St. Peter Havre de Grace. This, says Mr. Gardiner, is 'a more important matter.' The Managers of the Impeachment dwelt upon the ill-treatment of French merchants as being provocative of an impolitic war with France, and

alleged that the seizure of property from this particular ship was simply for Buckingham to enrich himself. It is well to note that the Papers now printed shew that 'this suspicion was unfounded,' though they also shew, what, we may remark, was already abundantly evident from other sources of information, 'the extreme carelessness with which public accounts were kept in those days.' The utter want of anything like a proper system of keeping and checking public accounts, had been matter of complaint in the House of Commons long before 'Baby Steenie's' day.

IV. The extortion of £10,000 from the East India Company. This point in the charges, says Mr. Gardiner, 'is admirably suited to illustrate Buckingham's high-handed proceedings.' To that extent, it may be considered proven. It is interesting to note that the famous Civilian, Dr. Zouch, advised the Company that it was 'doubtful' whether Buckingham could claim a tenth of all prizes as Lord High Admiral, unless he had issued Letters of Marque, which in the particular case he had not. The high-handedness must be divided between the King and Buckingham, since the King claimed £15,000 from the Company, for their alleged act of piracy in seizing their Portuguese prizes at Ormuz, while Buckingham ordered the stay of the ships of the Company in the Thames in 1624, but eventually let them go, perhaps fearing to exasperate the East India merchants too deeply. It seems probable that both Buckingham and the King were paid their demands in full.

V. The supply of English ships to make good deficiencies in the French navy. This appears to be proven. A contract was signed, 1625, with Effiat by the owners of seven merchant ships, and besides this, one ship of the Royal Navy, the *Vanguard*, Capt. Pennington, was to be 'lent' to the French King. Pennington, however, seems to have received rather confused and contradictory instructions, and he returned to England only three months after the signing of the contract for the merchantmen. Pennington's letters read like those of a bluff English sailor, with a traditional contempt for the French, as well as for Statecraft and Diplomacy.

P.

BETAGII, GAVELLARII, AND OTHER AGRICULTURAL TENANTS IN MEDIÆVAL IRELAND.

ATTENTION has been drawn in the present Editor's notes to some interesting researches in the history of Agricultural Tenants in Ireland, during the Fourteenth Century, contained in a Paper by Mr. James Mills, in the *Journal* of the Royal Society of Antiquaries of Ireland, 1890, Vol. I., Pt. i., 5th Ser., pp. 54 *seqq.* A few words to shew the nature of the information contained in the Paper may not be out of place here. Confining his researches to certain manors comprised in the estate of the See of Dublin, Mr. Mills finds the manors north of the city apparently enjoying a 'fairly peaceful state.' And in this district the Irish *nativi*, or betaghs, 'had progressed far on the road to recognised freedom.' 'No longer liable,' so Mr. Mills describes them, 'to render unlimited services at the demand of their lord, they held their lands at fixed rents, apparently not very excessive, and rendered services definitely regulated by custom, and generally little more than nominal in amount. Their position was quite as favourable as that of the villeins in England at the same period. As was the case in England, the growth of freedom had been gradual.'

Some qualification may be necessary as to the contemporary position of the villeins in England by recalling the fact that this was the century which saw the great Insurrection of the villeins, which can scarcely be regarded as a mark of their acquiescence in their position.

As to what the Betaghs, or *Betagii*, were, Mr. Mills says that they were 'the native servile tenants continued as nativi or serfs *adscripti glebæ*, under the Normans. They were transferred with the land, as well by Irish chiefs (both before and after the Norman invasion) as by the conquering Norman lords.' The Betaghs on the Archbishop's lands, we learn, paid, in 1326, 'a money rent varying usually from 6*d.* to 1*s.* an acre. They were, besides, bound to perform a certain amount of work for their lord, consisting of, perhaps, a day's work in haymaking and harvest.' This 'perhaps' is somewhat tantalising, as seeming to indicate some uncertainty as to the extent of the work so exigible. In another passage, Mr. Mills says that the services of the Betaghs had been commuted for rent near Youghal, as early as 1288. *Firmarii* formed another class, 'generally liable to the same rents and services as the betaghs,' with the exception of 'watching the lord's horses and oxen,' which Mr. Mills describes as 'a survival of the more onerous services of former times.' 'In rare instances' the *firmarii* 'paid rent only, freed of other services. They seem

generally to have succeeded betaghs, and probably differed from them only in not being bound to the soil.' In the manor of Swords, occupiers called *Gavellarii* are met, and perhaps also at Finglas. 'Their origin and position are uncertain.' Archbishop Alan, whose *Liber Niger* (*circa* 1326) is the authority for most of the details in the Paper, notes in his gloss that they were 'not tenants in gavelkynd as in Kent,' but 'firmarii at will or by charter, not cotters or betaghs, but in the nature of copyholders.' Mr. Mills, citing Eyton's *Somerset Domesday*, I. p. 42, suggests that the name may have been another form of *gabulatores*, met with in Domesday, who appear to have been freemen paying fixed rents.

The name *Gavellarii*, as Mr. Mills no doubt rightly says, has probably no connection with Gavelkind, but is derived from gavel, or rent.

There seem to be indications that the *Betagii* lived in village communities, and cultivated their land on some form of the open field system. For this Mr. Mills, *op. cit.*, p. 57, cites Sir Henry Piers's Description of County Westmeath in the Seventeenth Century, in Vallancey's *Collectanea*, I., pp. 115—19. Sir Henry says that the inferior rank of husbandmen were in his time called Sculloges. 'They held the pasture of each townland in common. . . . The arable land, though lying in common fields, was divided among the members of the community with the most extraordinary nicety. The whole field is divided into plots of an acre, half an acre, or quarter of an acre, measured with a rope. These plots were then grouped into as many shares as there were ploughs in the townland. The utmost care was taken by joining together in one share plots, good and bad from different quarters of the field, that the shares might be of exactly equal value. Then came the distribution—a number of stones or sods of turf equal in number to the shares into which the land had been divided were placed in a row on the ground. Then each man entitled to a share placed in a hat, in view of all the others, some distinguishing article—a bit of stick, a pebble, a scrap of iron, a rag, a flower, &c. Then a child or a stranger was called upon to draw these lots. He taking the several articles from the hat placed them one by one on the stones representing the divisions of the land. Notwithstanding the care and impartiality of the division, the wildest disputes followed the result of the lot, sometimes delaying the commencement of tillage work long after the proper time. It seems that those who possessed the means of working a plough got a full share of the land.' With regard to these customs in Westmeath, Mr. Mills is no doubt right in saying that they were most probably 'a survival of institutions previously more extensively followed,' and 'similar customs may have been practised by the betaghs of Swords and Finglas in the fourteenth century,'—and much earlier, we may add.

Q.

MEDIÆVAL SCOTTISH BURGHS AND BURGH LANDS.

INTERESTING illustrations of the state of Society and also of Land Tenure in Scottish Burghs in the Middle Ages may be found in a work to which the present Editor has not unfrequently referred in his foot-notes, *Inverurie and the Earldom of the Garioch*, by John Davidson, D.D., Minister of Inverurie. Edinb., David Douglas: Aberdeen, A. Brown & Co., 1878. From this work it may be seen that the Scottish Burgh, like its English sister, gave freedom to the serf who could escape to it, and live unclaimed by his former lord for a year and a day within its walls. The burghers themselves, within those walls, formed, as Dr. Davidson says, a sort of Venetian aristocracy, with whom rising scions of nobility might well find it to their interest to be friends. The qualification for burgess-ship at Inverurie, as in many other cases, was the possession of 'a toft of land within the burgh.' The history of these Roods, as they were called, is traced through several centuries of holders by Dr. Davidson, with considerable minuteness of detail. His remarks seem to give abundant evidence of the maintenance of the same family groups or settlements in the Burghs from the date of the earliest records, in some cases even down to the present day.

The Garioch, of which Inverurie was the capital messuage, being a Regality, the Lord Superior of the Regality retained in his immediate possession two portions of the Upper Roods, otherwise, it is apprehended, he would have been a 'stranger' within the Burgh. There were common lands, known as the 'Twal pairts,' and these twelfths were, at the time of the earliest notices, sub-divided into half and quarter twelfths, all, apparently, divided periodically by lot, a custom pleaded as late as 1616, and there were out-field and in-field twelfths. The Town Hall, built in 1660, was erected, very fitly, on the Roods which in the Middle Ages had been described as 'at the Cross' or 'in the middle of the burgh.' One portion of land bore a designation, the 'standard Rig,' which, as Dr. Davidson no doubt judges rightly, indicated that by it 'the Deans of Guild had to verify the measurements claimed by holders of Roods' (*op. cit.*, p. 114). Another interesting memorial of the Past connected with the Roods known as 'at the Cross' is that, as we are told, 'When we come upon records of royal proclamations, long after, we find that they were made at the Cross, and at the Cuning Hill' (*op. cit.*, *u. s.*). A tradition to the effect that the Cuning Hill was the burial-place of the second of the Scoto-Pictish line of Kings, Aodh, or Hugh, 'of the swift foot,' son of Kenneth MacAlpine, defeated by Cyric, or Greg, at

Strathallan in Angus, in 878, may have helped, as Dr. Davidson suggests, to make that mound the 'sacred place' of the municipality. 'The town,' says the minister, 'was probably, in 1400, all within sight and cry of the Cross; and the Cross well may have served the whole community.' The principal crime tried in the Burgh at the Circuit of the Justiciar, in 1400, was that of forestalling, *i.e.*, anticipating the open market. But the Laws of the Burghs shew that a guild brother was known to be guilty of 'sticking another with his niff,' for which indulgence of his unruly temper he had to pay half a merk, and to make amends 'at the will of the Alderman [or, as we should now say, Provost], the Dean, and the laiff of the brethren,' and for greater security, no burgess was to wear a 'knyff' with a point, under fine of 12*d.* Such was Inverurie, shortly before the *coronach* was cried for Harlaw.

R.

PAYMENT OF EXPENSES OF SCOTTISH COMMISSIONERS TO PARLIAMENT, 1661–3.

THE ancient practice of allowing the expenses of representatives in Parliament, to which reference is made in the text in connection with the writ *De Expensis levandis*, prevailed in Scotland as well as in England, and lasted apparently down to a somewhat later date. In *Northern Notes and Queries*, edited by Rev. A. W. Cornelius Hallen, M.A. (Edinb., David Douglas), Vol. III., No. 9, for June, 1888, there is printed, from the Ardchattan MSS., the following interesting document.

'Stent roll For payment of the Somme of Two thousand Thrie hundreth and Fyftie pundis scottis Dew for the charges of James Campbell of Ardchattane Commissioner of Parliat [*sic*] for the Schyre of Argyll maid and set doun be Sir Dougall Campbell Sir James Lamount and Duncane McCorquodill of Phantellans As haveing power and commissione fra the Lordis of Counsell and Sessione. . . . And payeable be the kinges barrones and frie holders within the said Schyre According to the Severall proportions of Rentis . . . . For attending the last thrie sessiones of Parliament 1661, 1662, and 1663 as his commissioner fie according to my Lord Clerk register his attestatioune with four days cuming and four dayes going at ilk sessioune of the farsaid thrie sessiones of parliament . . . subscrybitt . . . the sixt day of October I.MC. three scor thrie yearis.'

From the tenor of this document it results that the payment included travelling expenses as well as an allowance during the session, and that the charges were assessed upon the Barons and Freeholders of the Shire in conformity with the charges allowed by the Lord Clerk Register, presumably on claim made by the Commissioner for the Shire, and duly apportioned by Commissioners appointed for the purpose by the Lords of Council and Session. This shews that the recognition of the payment was as full and legal in Scotland as in England. In both countries, probably, the date of the commencement of the desuetude of the practice was much the same, though seemingly rather later in Scotland than in England. In view of the recent tendency towards a revival of this allowance, the document, of which the substance has here been set out, has a more than antiquarian interest.

S.

THE FIRST CONSTITUTION OF CONNECTICUT, 1639.

SINCE the third Edition of this *Constitutional History* was published, the State of Connecticut has celebrated, with an enthusiasm worthy of the event commemorated, the two hundred and fiftieth Anniversary of the First Constitution, established by the young Colony in 1639, 'according to God,' and with the remarkable feature that 'no King, nor charter, nor Parliament, nor previously existing government had mention in the instrument upon which it was organized.' So runs the statement made in the Historical Address delivered by Rev. Joseph H. Twichell, during the Exercises at the First Church, Hartford, Conn., Jan. 24th, 1889, on the occasion of the above commemoration. The Connecticut Historical Society fitly took the lead in making all necessary arrangements for the celebration, and collected the Addresses and Letters connected therewith into a handy volume entitled,—somewhat erroneously, in strict law, it must be remarked—*Celebration of the Two Hundred and Fiftieth Anniversary of the Adoption of the First Constitution of the State of Connecticut.* Hartford, Conn. Published by the Connecticut Historical Society, 1889. We are obliged to say that this very interesting book is somewhat erroneously named, because it must be obvious that at the time of the adoption of the Constitution of 1639, Connecticut was not a State. It was, in Law, whatever it

may have been in the theory of its founders, and however free from Home intervention in fact, a Colony or Plantation of this country, one of His Majesty's American Plantations.

That the founders of Connecticut paid small regard to King or Parliament of the old country may well be the case, but that does not alter the fact of their quality of subjects of the King of England. They may, as Mr. Twichell says (*op. cit.*, p. 27), have recognised, or at least appeared to have recognised, 'no outside human authority whatsoever as the source and basis' of their powers, but the authority was there, although in the background.

It is true, no doubt, in great measure, as Mr. Bancroft is cited by Mr. Twichell as remarking, that the early New England Community was 'so humble that no statesman condescended to notice it,' and this happy obscurity, no doubt, was the cause of the remarkably Liberal Constitution which the parent colony of Massachusetts, the Bay State of later days, procured by Charter of Charles I., only a few days, as Mr. Twichell aptly notes (*op. cit.*, p. 32), before the King 'proclaimed his design of thereafter ruling England without the aid of Parliament.' Now the founders of Connecticut were seceders from liberally chartered Massachusetts. For the Royal Charter seemed to not a few of the Colonists too Liberal. 'So,' says Mr. Twichell, 'thought many of the leaders of the colony, the men chief in wealth, social rank, and influence.' And these men proceeded, it would seem, to counteract the too great Liberalism of Charles I. by getting the power into their own hands, and creating, in fact, an Oligarchy. But this was distasteful to a large proportion of the freemen of the Colony in whom the power was constitutionally vested. Hence internal dissensions, leading eventually to the secession, unauthorised by the General Court of Massachusetts. 'It was by the magistrates of the Bay never consented to,' says Mr. Twichell (*op. cit.*, p. 40). This fact is not without importance in regard to the light which it may rightly be held to throw on the intentions of the founders of Connecticut. They had left a Colony governed by a Royal Charter, the Liberal spirit of which was being, in their view, violated by Oligarchical rule introduced under the plea of the need of a strong arm to keep the infant settlement together, and to provide for the merest daily wants of the community. What, then, did the Founders of Connecticut mean to found? Obviously, what they had failed to find in Massachusetts, viz., a Free, Self-governing Community. Mr. Twichell calls this a Democracy, and that is, no doubt, what the Founders of Connecticut actually did found. It is also, in his opinion, what they meant to found. 'They definitely meant a democracy and nothing else' (*op. cit.*, p. 31). This deed of theirs, no less remarkable in itself than the Liberal Charter of Massachusetts Bay, was yet, Mr. Twichell says, 'no note of defiance and revolt.' We can scarcely, however, call it a note of submission. That

there was, as Mr. Twichell will have it, 'no jurisdiction over them claimed *this* [*i.e.*, the American] side of the Atlantic or anywhere else—audibly to them at all events,' we can only admit as partially true. Massachusetts gave no permission, and the Crown still less. As, however, nobody protested, or claimed jurisdiction, 'audibly to them,' the founders of Connecticut did, in fact, lay deep in American soil the foundations of a Democracy, *i.e.*, of a Government of the People, by the People, for the People. And we do not doubt that this is exactly what they had it in their minds to do, though they might not have given it the name of Democracy. They founded, and they meant to found, a government, as Mr. Twichell puts it, 'on the sole authority, under God, of the will of the people.' They appointed the holding of two Assemblies or Courts, the one a Court of election, to choose a Governor and six magistrates, the other a General Court, consisting of the Governor and magistrates and a body of deputies, not exceeding four from each of the towns which constituted the new Commonwealth, viz., Windsor, Hartford, and Wethersfield, 'for making of laws and any other public occasion which concerns the good of the commonwealth.' And they provided that if the Governor neglected to summon the General Courts as bound by the Constitution, and, after petition by the freemen, neglected or refused so to summon the said Courts, then 'the said freemen, or the major part of them, shall have power to give orders to the Constables of the several towns to do the same, and so may meet together and choose to themselves a moderator, and may proceed to do any act of power which any other general court may.' We agree with Mr. Twichell that the 'sense' of this is 'very unmistakeable.' It is the establishment of a Free Self-governing Community. It is what Mr. Twichell and his brother citizens of Connecticut call a Democracy. It is also, *mutatis mutandis*, exactly what the nearest relations of the Founders of Connecticut in the Old Country established as law under a Monarchical Government, in the Act of the Long Parliament, 1641, known as the Triennial Act, to ensure the due assembling of Parliament, failing the Constitutional action of the Lord Chancellor or Keeper of the Great Seal, and failing the Constitutional meeting of the Peers in default of such action. In the last resort, 'the electors themselves were to meet and proceed to choose their representatives, in the same manner as if writs had been regularly issued from the Crown,' as is set forth in the text of the present *History*, *supra*, p. 605. In any case, call them what we will, the Founders of Connecticut were builders and Reformers. As Mr. John Hooker, of Hartford, who was welcomed at the celebration as of the blood of Thomas Hooker, one of the Founders, and not the least distinguished for ability and Political clear-sightedness, rightly reminded his fellow-citizens (*op. cit.*, p. 64, *seqq.*), 'the work of up-building is a work of Reform;' and, again, the true

reformer, who, as Mr. Hooker truly says, is 'not necessarily an iconoclast,' 'builds upon the foundation of old ideas, but the superstructure is of new ideas, or of ideas that have been overlooked or lost, and are practically new to the age.' So it was with the Founders of Connecticut. They were at once up-builders and Reformers; they built upon the foundation of old ideas. They builded, in a sense, 'better than they knew.' They laid some of the first stones of the United States on the foundation of old English ideas of Freedom and Self-government.

T.

PETITIONS OF RIGHT.

THIS mode of obtaining redress, the value of which is so strongly emphasised in our History by the famous Petition which Sir Edward Coke advised the Commons of England to put up, is of such rare occurrence in actual practice, that a recent case which has come under the present Editor's notice in the English Law Reports published in the *Glasgow Herald*, for 15th Jan., 1890, seems to deserve a place in these *Appendices*.

The facts of the case are briefly these, and they will, it is believed, suffice to shew the importance of the points raised by the Petition.

The Petitioner, Colonel Mitchell, retired from the Army in January, 1887, after, it is stated, a period of active service of about thirty-one years. He had entered on the terms of a Royal Warrant of 1854, under which he was to have the option of retiring on a pension of £600 a-year after thirty years of service, provided there was a vacancy on the pension list and he had become Colonel or Major-General. He had also the right to continue to serve all his life on full pay until he became a Major-General, with the certainty of becoming a Colonel-Commandant at about £1000 a-year. A Warrant of 1881 made removal to the Half-pay list compulsory, and retirement on pension virtually compulsory, after five years' service as Lieutenant-Colonel. A Warrant of 1884, applicable to the Petitioner, enacted that certain officers retired compulsorily under previous Warrants should have such an addition made to their retired pay as the Secretary of State should, on the report of the Army Purchase Commissioners, consider equivalent to the loss incurred by the operation of such Warrants. Col. Mitchell, having been, on his compulsory retirement, Jan. 19th, 1890, placed on half-pay at the rate of £450 per annum, with £150 per annum as compensation under the Warrant of 1884, submitted

in his Petition, presented in Q. B. D., before Mathew, J., that the compensation offered was inadequate. For the Crown it was contended that compensation is at the pleasure of the Crown, and that as the Petitioner's case was treated under the authority of a Secretary of State, whose decision is final and binding, no Courts of Law could interfere.

There can be no doubt that the result of this Petition will, as the *Glasgow Herald* says, be watched with interest by all officers, —and their number is far from inconsiderable,—who are affected by the new arrangements. The case deserves to be watched with interest by a yet wider circle than that of the persons whose personal prospects are touched by the Royal Warrants. The contention that the decision, in such a matter, of a Secretary of State is final and binding, and one with which no Court of Law can interfere, appears to us to involve a doctrine of grave Constitutional importance. If allowed by the Queen's Bench Division, as to which we have been unable to trace any decision, the case, apparently, not having yet been reported, the allowance of this contention on the part of the Crown would go far to render the subject's right of Petition nugatory as far as may concern all who are engaged in the Civil, Naval, or Military service of the Crown. This would, in effect, oust a very seriously large proportion of Her Majesty's subjects from the right of Petition, and it is difficult to see in such a deprivation anything short of a serious attack upon the rights of the subject. The Courts may consider themselves estopped from reviewing the decisions of the Secretary of State for War; or they may hold that, on the facts, there was not a sufficient cause for complaint on the part of the Petitioner to justify the course of procedure by Petition of Right. This would be a simple decision on the facts, and would leave the broad question of the general right of Petition untouched. But if the judgment of any Court, whether the Q. B. D., or on appeal therefrom, should be given, or have been given, in favour of the contention of the Crown that the Courts are barred by the decision of a Secretary of State from taking cognisance of such a case as that of Colonel Mitchell,—it would seem that it will be high time for those subjects who are not in the service of the Crown to consider how far such a decision may not indirectly affect them, and gradually eliminate from the rights of the subject this *ex hypothesi* sometime cherished right of Petition. The real question raised is not so much that of the individual rights, whatever they might be held by a Court legally to be, of Col. Mitchell, as the right of Petition to the Crown inherent, or hitherto supposed to be inherent, in the subject,—a right believed by no less an authority than Sir Edward Coke, and proved by the action taken by his colleagues in Parliament at his advice, to be of the highest Constitutional importance. It will be an evil day for the subject when he can no longer 'put up a Petition of Right.'

U.

SUCCESSION BY TANISTRY IN THE PEERAGE OF IRELAND, UNDER HENRY VIII.

A CURIOUS point seems to be raised in a Paper by Mr. G. J. Hewson, M.A., in the *Journal* of the Royal Historical and Archæological Association (now Royal Society of Antiquaries) of Ireland, Fourth Ser., vol. ix., pp. 239–42, July-Oct. 1889, on the *Succession of the Early Earls of Thomond.* Mr. Hewson appears to contend that in the Patent of Henry VIII., creating Murrogh O'Brien Earl of Thomond, 1543, 'with remainder, not to his son Dermot, but to his nephew Donogh, who was his successor by the law of tanistry,' Henry was acting on strictly Irish principles of Law (Sir Bernard Burke's account, *s.v.* Inchiquin, in his *Peerage*, leaves a doubt whether Henry provided for any succession beyond that of the grantee's nephew; if the Patent was for life to Murrough, and then, for life, also, to Donogh, what sort of Peerage was the Earldom of 1543?), and that it was the new Patent, *t.* Edw. VI., issued in favour of Donogh, then 2nd Earl of Thomond, in 1552,—following on his surrender, says Burke, of the earlier Patent,—which included a remainder in tail male, which '*for the first time*' introduced the succession by primogeniture into the chieftainship of Thomond. 'This,' Mr. Hewson continues, 'was the cause of great commotion in Thomond, as it affected the rights of Donal, Earl Donogh's next brother, who was his successor by the law of tanistry.' It so happened, however, fortunately for the peace of Thomond, it may be presumed, that, as the *Annals of the Four Masters* tell us, this 'contention did not long continue, for Donogh More O'Brien, the Earl of Thomond, having died on Passion Saturday following, [1553], Donal succeeded in his place.' On this Mr. Hewson's comment is, 'As he should have done by the law of tanistry, which had been superseded by the English patent of the year before, which, however, had then little authority in Thomond.'

Mr. Hewson's explanation of Earl Murrogh's position in regard to the chieftainship of Thomond by the Law of Tanistry may be given in a few words. Murrogh, he says, 'was not a usurper; he succeeded quite regularly according to the law of tanistry; he was the regularly elected tanist and successor to his brother Conor, who died in 1539; another brother, Donogh, had been tanist, but he died in 1531, and Murrogh became tanist. It was the regular course of events in Irish chieftainship, and in none more so than in that of the O'Briens of Thomond.'

Mr. Hewson gives several more citations from the *Four Masters*, to shew how the interference of the English Government on behalf

of Conor, son of Donogh, second Earl, and himself third Earl under the Patent of 1552, was looked upon by the inhabitants and the Irish in general, and the language of some of them, expressing as they do the 'abomination, hatred, disgust, and terror,' which seized upon them on the banishment of Donal, the would-be successor by Tanistry to Earl Donogh, seems sufficient to justify Mr. Hewson's contention that they shew 'how strongly the principle of tanistry was fixed in the minds of the Irish.' It would seem, therefore, that the action of Henry VIII. in issuing Letters Patent for an Irish Earldom with remainders in accordance with the Law of Tanistry, was a piece of statecraft on his part, designed to pave the way for that introduction of primogeniture which was carried out in the same Earldom by Edward VI.

That Henry VIII. designed the introduction into Ireland, among the Celtic chiefs, of a Peerage the honours of which should in time take the place of the old Celtic Royal and Princely titles, seems beyond question. The *State Papers, Ireland,* 1509–73, edited by Mr. H. C. Hamilton, afford ample evidence that both the King and his Deputy and Council in Ireland gave the most careful consideration to the titles to be selected for the new Peers. Thus, in regard to Murrough and Donogh O'Brien, we find, *op. cit.* p. 63, that the Lord Deputy and Council recommend that O'Brien should be created Earl of Thomond, and Donough O'Brien a Viscount. The King in reply agrees that O'Brien shall be created Earl of Thomond, but only allows Donough a Barony, which was not going so far as the recommendation of his Irish representatives. Again, in the same letter, Henry says that O'Neill may be created a Peer 'by any title except Earl of Ulster.' Similarly, the Deputy and Council recommend, p. 66, that 'McWilliam' [Bourke] be 'Earl of Clanricard, not of Connaught.' It is thus evident that great care was exercised as to the selection of the Titles to be conferred, and it may be that Henry VIII., while desiring to put an end to the Brehon Law, yet, wishing to conciliate Irish feeling as far as he deemed prudent, in creating an Earldom for the Chief of Thomond, conferred it with limitations practically identical with those of the Brehon Law of Tanistry.

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